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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

IN RE: VIOXX PRODUCTS LIABILITY LITIGATION
MDL Docket No. 1657

GLENN L. DIER, ET AL.,

Petitioners,

v.

MERCK & CO., INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a transferee court use its authority pursuant to 28 USC §1407 to invoke the judicially-created "quasi-class action" doctrine to preside over a mass settlement involving thousands of widely divergent personal injury actions and permit such a settlement to be approved outside the strictures of Rule 23 of the Federal Rules of Civil Procedure without contravening Article III and depriving individual litigants of their rights guaranteed by the due process and right to jury trial clauses of the Constitution of the United States?

RULE 14.1(b) STATEMENT

The petitioners, who were the plaintiffs-appellants below, are Carol Adelberg, Geraldine M. Alapeck, Adnan A. Aljibory, Antonio Amendoeira, Helen Bilik, Elizabeth Boone, Albert D. Cadwell, Samuella Cadwell, Manuel Carniero, Marjorie Connolly, Wilbert Corprew, Carolyn S. Croft, Rodney Darrow, Alphonse V. DeRosa, Carlo DeVincentiis, Glenn L. Dier, Kristina Donahue, Robert Gates, Herbert Gehm, Charles Harris, Jr., Sheila L. Hickok, Joanne Hochrun, Kathleen Hoffner, Suzanne Holdredge, Rosemary T. Holobosky, Frank P. Kunik, Kimberly Lindsey, Mary J. Mahar, Ronald R. O'Connor, William Patrick, Kevin Pitcher, Elsa Plocek, Marianne Raftis, Thomas J. Roman, Rosana Robinson, Dean Santacrose, Ronald H. Schaffer, Stasia Simmons, Sheila Smith, Victoria Smith, Margaret Steinhoff, Thomas J. Sullivan.

The respondent, who was the defendant-appellee below, is Merck & Co., Inc. (now Merck Sharpe & Dohme, Inc.

RULE 29.6 STATEMENT

Petitioners state that they are all individuals plaintiffs and are not corporate entities.

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OPINIONS BELOW

The opinion of the Court of Appeals is not reported in F.3d, and is unofficially reported at 2010 WL 2802352 (5th Cir. 2010), and is reprinted in the Appendix to this petition. (App. 1a-14a.) The opinion of the district court is not reported in F.Supp.2d, and is unofficially reported at 2009 WL 1158887 (E.D.La., 2009). (App. 17a-25a.) The order of the Court of Appeals denying rehearing and suggestion for rehearing *en banc* is not reported. (App. 15a-16a.)

JURISDICTION

The judgment of the Court of Appeals was entered on July 16, 2010. The order denying petitioners' timely motion for rehearing *en banc* was entered on August 19, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Article III, Section 2, Clause 1 of the United States Constitution, which provides:

> Clause 1: The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to

> Controversies between two or more States;—between a State and Citizens of another State; (See Note 10)—between Citizens of different States, —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

This case also involves the Fifth Amendment to the United States Constitution which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

This case also involves the Seventh Amendment to the United States Constitution which provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATUTORY PROVISIONS INVOLVED

The question presented by this petition involves Rule 23(a),(b), (c)(4) and (5), and (e) of the Federal Rules of Civil Procedure, entitled "Class Actions," which provide in relevant part:

> (a) **Prerequisites.** One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) **Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied and if:
>
> (1) prosecuting separate actions by or against individual class members would create a risk of:
>
> (A) inconsistent or varying adjudications with respect to

individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting te class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the

prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c)... (4) **Particular Issues.** When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) ***Subclasses.*** When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

...

(e) **Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all classs members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement, unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

The question presented by this petition further involves 28 U.S. C. § 1407(a) and (b), entitled "Multidistrict litigation," which provides in relevant part:

(a) When civil actions involved one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated. *Provided however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee

> district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated proceedings.

This case involves the Rules Enabling Act, codified at 28 U.S.C. § 2072, which provides in relevant part:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

STATEMENT OF THE CASE

Petitioners' personal injury lawsuits against respondent Merck & Co., Inc. ("Merck"), arose out of ingestion of the drug rofecoxib sold under the trade name Vioxx, and were filed in state and federal courts

in New York before being transferred to MDL No. 1657. (App. 4a.)[1]

Vioxx belongs to a class of drugs known as NSAIDs (non-steroidal anti-inflammatory drugs) which are prescribed for pain relief, and provide pain relief by inhibiting production of cyclooxygenase (COX), the enzyme which produces prostaglandins responsible for pain and inflammation. *See In re Vioxx Prods. Liab. Litig.*, 401 F.Supp.2d 565, 570 (E.D.La. 2005). After private pharmaceutical laboratories discovered the COX enzyme had two components, one providing protection of the stomach lining (COX-I) and the other pain relief (COX-II), Merck was able to isolate COX-II and develop Vioxx to be promoted as providing pain relief without gastrointestinal side effects associated with traditional NSAIDs. *Id.*

The FDA approved Vioxx in May 1999 for sale in the United States to relieve pain from chronic or acute inflammation associated with osteoarthritis, rheumatoid arthritis and other musculoskeletal conditions. *Id.* Merck had an aggressive marketing campaign garnering larger U.S. marketshare than rival Pfizer, Inc.[2] *Id.*

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1. */Petitioners draw the following alleged facts from their complaints and public documents of which the Court may properly take judicial notice. *Tellabe, Inc., v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 127 S.Ct. 2499, 2509 (2007).

2. The district court found an estimated 105 million prescriptions for Vioxx written in the United States between May 1999 and September 2004 leading to an estimate of 20 million patients having taken Vioxx. *See In re Vioxx Prods. Liab. Litig.*, 2008 WL 328 5912 (E.D.La. 2008).

However, by September 30, 2004, Merck withdrew Vioxx from the U.S. marketplace because data acquired in the course of clinical trials indicated Vioxx increased the risk of adverse cardiovascular consequences. *Id.*

It was not long before multiple lawsuits were filed in both state and federal courts throughout the country, and on February 16, 2005, the Judicial Panel on Multidistrict Litigation directed Vioxx cases pending in federal courts be centralized and designated as MDL No. 1657, and assigned them to the Honorable Eldon E Fallon in the Eastern District of Louisiana. (App. 2a.)[3] Petitioners' 27 cases were pending in New York federal courts and transferred to MDL No. 1657, and are among thousands alleging cardiovascular injuries that did not include heart attack, ischemic stroke or sudden cardiac death. *See In re: Vioxx Prods. Liab. Litig.*, 574 F.Supp.2d 606, 611-12 (E.D.La. 2008).[4]

When MDL No. 1657 was assigned, Judge Fallon already had some Vioxx cases pending in his district, and he began moving the cases toward trial. In a decision ruling on *Daubert*[5] issues, Judge Fallon, after succinctly summarizing plaintiffs' scientific position,

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3. *See also, In re Vioxx Prods Liab. Litig.*, 360 F. Supp. 2d 1352 (J.P.M.L. 2005).

4. The district court observed "there are approximately 50,000 eligible claimants currently enrolled in the Vioxx Settlement Program, all of whom are subject to the same settlement matrix for awarding points and valuating claims." *Id.*, 574 F.Supp.2d at 611-12.

5. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

rejected Merck's motions to preclude various plaintiff experts from testifying even short-term use of Vioxx increases the risk of heart attacks and heart disease accepting testimony by plaintiff's experts it accelerates atherosclerosis. *Id.*, 401 F. Supp.2d at 572, 582-587. The *Daubert* rulings made clear the adverse cardiovascular consequences stemming from ingestion of Vioxx were not limited to heart attacks, ischemic strokes or sudden cardiac death. *Id.*

"In November 2006, [Judge Fallon] denied certification of a nationwide class because the plaintiffs' claims raised choice-of-law hurdles and numerous individualized questions of fact. *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 458-59, 461 (E.D.La. 2006)." (App. 3a.) He held six bellwether trials with thirteen (13) additional cases tried before juries in state courts with mixed results. *In re Vioxx Prods. Liab. Litig.*, 574 F.Supp.2d 606, 609 (E.D.La. 2008). "With the benefit of experience from these bellwether trials, as well as the encouragement of the several coordinated courts," he appointed a small group of attorneys to serve as the "Negotiating Plaintiffs' Counsel" ("NPC"), and "the parties soon began settlement discussions in earnest." *Id.* The district court has described the negotiations as follows:

> FN 5. In their efforts to develop a comprehensive, joint settlement agreement, counsel for Merck and the Negotiating Plaintiffs' Counsel (NPC) met together more than fifty times and held several hundred telephone conferences. Although the parties met and negotiated independently, they kept

> this Court-as well as the coordinate state courts of Texas, New Jersey, and California-informed of their progress in settlement discussions.

Id., at 609 n.5.

The district court describes the outcome of the negotiations thusly:

> On November 9, 2007, Merck and the NPC formally announced that they had reached a Settlement Agreement. *See* Settlement Agreement, *In re Vioxx Prods. Liab. Litig.*, MDL 1657 (E.D.La. Nov. 9, 2007) ("Settlement Agreement"), available at *http:// www. browngreer. com/ vioxx settlement.*[] The private Settlement Agreement establishes a pre-funded program for resolving pending or tolled state and federal Vioxx claims against Merck as of the date of the settlement, involving claims of heart attack ("MI"), ischemic stroke ("IS"), and sudden cardiac death ("SCD"), for an overall amount of $4.85 billion. Id. § "Recitals".[] The Settlement Agreement is a voluntary opt in agreement and expressly contemplates that this Court shall oversee various aspects of the administration of settlement proceedings, including appointing a Fee Allocation Committee, allocating a percentage of the settlement proceeds to a Common Benefit Fund, ap proving a cost assessment, and modifying any provisions of the Settlement

> Agreement that are otherwise unenforceable.[] Accordingly, this Court has consistently exercised its inherent authority over the MDL proceedings in coordination with its express authority under the terms of the Settlement Agreement to ensure that the settlement proceedings move forward in a uniform and efficient manner.[]

In re Vioxx Prods. Liab. Litig., 650 F.Supp.2d 549, 552-53 (E.D.La. 2009) [footnotes omitted].

However, announcing the MSA was not the only activity that date:

> On November 9, 2007 the district court entered several pre-trial orders with respect to the claims of those plaintiffs who could not or chose not to participate in the MSA. PTO 28[] required non-settling plaintiffs to notify their healthcare providers that they must preserve evidence pertaining to the plaintiffs' use of Vioxx. Plaintiffs were also required to produce pharmacy records and medical authorizations, answers to interrogatories, and a Rule 26(a)(2) report from a medical expert attesting that the plaintiff sustained an injury caused by Vioxx and that the injury occurred within a specific time period. Failure to comply could result in dismissal of the plaintiffs' claims with prejudice.[]

(App. 3a-4a, footnotes omitted.) PTO 28 mirrored the MSA limiting compensation to heart attacks ischemic

strokes and sudden cardiac death in its definitions section. *See* PTO 28 III and MSA 2.2.1.1. PTO 30 imposed a stay of discovery by plaintiffs but not Merck, while PTO 31 enforced the terms of section 1.2.8 of the MSA by requiring all plaintiffs' counsel of record to register all claims in which they had an interest and to recommend to each client that they enroll in the MSA. (App.4a.)

PTO 28 contains lengthy directives to plaintiffs, and permits Merck to move for dismissal for *any* deficiency in complying, as evinced by the fact petitioners' cases were all dismissed solely for the failure to submit the required expert report, even though they otherwise complied. (App.24a.) PTO 28 also duplicated the preservation requirements already imposed in PTO 1, even though the record was devoid of any pre-MSA dispute between the parties raising any violations of PTO 1.[6]

These PTOs were not the result of any motions practice. Instead, they served notice on plaintiffs that if they did not consent to the MSA terms, the sword of dismissal was hanging over their heads for any discovery deficiency and would come down hard and without recourse to any protections provided for in Rule 26. In that regard, PTO 28 required hiring experts to provide:

> A Rule 26(a)(2) case specific expert report from a medical expert attesting (i) to a

6. PTO 1 directed "counsel is under an obligation to the court to exercise all reasonable efforts to identify and notify parties and nonparties, including employees of corporate and institutional parties...." PTO 1, paragraph 13.

> reasonable degree of medical probability that the Plaintiff or Claimant suffered an injury and (ii) that Vioxx caused the injury. The case specific expert report must include (i) an explanation of the basis of the attestation that Vioxx caused the Plaintiff or Claimant to suffer the injury, (ii) an identification of any other caues that were considered in formulating the opinion, (iii) a description of the specific injuries allegedly suffered; (iv) a description of the specific medical findings that support the diagnosis of those injuries; and (v) ...identification of all documents relied upon by the expert in forming his opinions.

PTO 28, MDL Document 12962, at p. 4. PTO 28's burden in this regard was not only expensive and wasteful, it gave Merck a litigation advantage backed up by PTO 30 which "imposed a stay of discovery . . . , with the exceptions for discovery activities required by PTO 28 and previously scheduled...depositions." (App. 4a.)

Petitioners argued from the outset that the MSA and PTO 28 should be construed *in pari materia* in light of the history of their genesis. On December 7, 2007, one month after the MSA was announced, some instant petitioners along with other plaintiffs, filed a notice of appeal to the Fifth Circuit of Judge Fallon's entry of PTOs 28 and 30. Merck moved to dismiss the appeal and the Fifth Circuit granted dismissal on March 28, 2008. (App. 19a.)

Shortly thereafter, another group of plaintiffs, identified by counsel's name as the "Oldfather plaintiffs,"

sought modification of PTO 28 on the grounds its requirements were "premature and unfairly burdensome." (App.5a.) These arguments were rejected by the district court in a subsequent order in August 2008 setting a schedule for expert reports.

On June 30, 2008, the "Benjamin plaintiffs," including some of the instant petitioners, moved against the MSA and PTO28, citing failure to comply with Rule 23 requirements, and seeking more extensive relief, including vacating the MSA, modifying PTO 28 and entering a protective order pursuant to Rule 26(c). (*Id.*) The motion sought to modify PTO 28 to allow submission of expert affirmations in two cases representative of particular cardiovascular injuries in issue to demonstrate they add little to the information already provided in the fact sheets, and to show requiring such reports gives Merck a substantial trial advantage in later using the abbreviated opinions to discredit the expert's credibility at trial. Petitioners submitted bills for the expert's services in the two representative cases to demonstrate the litigation costs provided no benefit to the court in managing the litigation, yet drove up plaintiffs litigation costs.

On November 26, 2008, Merck moved to dismiss petitioners' cases pursuant to Fed.R.Civ.Pr. 41(b) on the grounds of failure to meet the discovery requirements, and on December 3, 2008, the district court issued an order to show cause why the actions should not be dismissed for failure to provide the case specific expert report required by PTO 28. (App. 6a.)

About a week later, before petitioners's opposition was due, the court entered its Order & Reasons decision

dated December 11, 2008, denying petitioners' aforementioned motion to vacate the MSA and for other relief, rejecting their argument the MSA and PTO 28 should be construed *in pari materia*, ruling:

> Despite the Benjamin Plaintiffs' rather unspectacular argument that plaintiffs' lead counsel may not bind the litigants in an MDL to a settlement agreement, the Benjamin Plaintiffs are unable to show how in fact they are "bound" by the terms of the private, opt-in settlement they seek to vacate. Lacking any support for that argument and legal precedent, the Benjamin plaintiffs appear to base their request more on their own individual desire to rewrite the terms of the settlement.

MDL Record Document 17394, at p.7. The court further ruled the motion seeking relief from PTO 28, which it characterized as a *Lone Pine*-type order, "amounts to little more than a thinly-veiled motion to vacate the order." *Id.*[7]

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7. *Id., at pp. 3, 8-9.* Although not so called when issued with the MSA, the Fifth Circuit accepted that, "PTO 28 is characterized as a *Lone Pine* order" (App.3a, n.1). Petitioners asserted below that a *Lone Pine* order and Rule 41(b) are not appropriate discovery sanctions, particularly because the Vioxx litigation involves only one defendant, the plaintiffs submitted their pharmacy and medical records showing ingestion, and the district court's own opinions repeatedly set forth the straightforward nature of the case against Merck, arguments which both the district court and the Fifth Circuit rejected. (App. 12a-13a.)

This was followed by the April 29, 2009 order dismissing petitioners' cases with prejudice. (App.15a-25a.)

The Court of Appeals similarly rejected petitioners' arguments they were entitled to procedural and structural protections set forth in Rule 23, and, with little discussion, adopted the fiction that the MSA was a private opt–in settlement agreement to resolve claims for those plaintiffs who met the criteria set forth in MSA section 2..2.1.1 and PTO 28 III, and did not reach the constitutional dimensions by concluding petitioners were "non-settling parties" who did not have standing to challenge the MSA. (App.7a-8a.)

REASONS FOR GRANTING THE PETITION

I.

A QUESTION OF EXCEPTIONAL PUBLIC IMPORTANCE IS PRESENTED TO RESOLVE THE QUESTION OF WHETHER TRANSFEREE DISTRICT COURTS EXERCISING MANAGERIAL AUTHORITY UNDER 28 USC 1407 MAY EXTEND THEIR AUTHORITY TO OVERSEE LARGE-SCALE MASS SETTLEMENTS AMONG LITIGANTS WITH WIDE AND DIVERGING INTERESTS WITHOUT ADHERING TO THE STRICTURES OF RULE 23.

This Court made clear no global compromise of a class action could be achieved without "structural assurance of fair and adequate representation for the diverse groups and individuals affected." *Amchem*

Products, Inc., v. Windsor, 521 U.S. 591, 117 S.Ct. 2231, 138 L. Ed. 2d 689 (1997). On its face, the Vioxx MSA established a nationwide administrative claims regime similar to the schemes that were before this Court in *Amchem*, and later in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999).

Contrary to the letter and spirit of *Amchem* and its progeny, the managerial authority conferred upon multidistrict transferee courts pursuant to 28 U.S.C. §1407 is being used to create class settlements outside Rule 23, as was recently captured by the district court's recent rulings on common benefit fees which indicate the Master Settlement Agreement is simply part of a process whereby "class actions morph into multidistrict litigation, as is the current trend." *See* 10/19/10 Order & Reasons, MDL Rec.Doc. 54040, at p. 11. This is consistent with Judge Fallon's statements in a law review article that: "By virtue of the temporary national jurisdiction conferred upon it by the MDL Panel, the transferee court is uniquely situated to preside over global settlement negotiations." Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2340 (2008). That article goes on to opine:

> [W]hen the structure provided by the transferee court breaks down upon the dissolution of an MDL, that is, when cases are remanded to the districts from which they originated, it becomes exceedingly difficult to organize and achieve a global settlement of related claims. The institutional value of the transferee forum in this respect is beyond dispute.

Id., at n.77. Petitioners respectfully submit Judge Fallon describes a "trend" that not only impermissibly intrudes into the legislative sphere, but runs roughshod over constitutional rights of individual litigants, such as petitioners, who "morph" from absent class members into "non-settling plaintiffs" by judicial override of Rule 23.

Indeed, although no global settlement has been as bold as the Vioxx MSA, in the past decade federal judges have made an end run around Rule 23 by impermissibly expanding the limited reservoir of authority conferred by 28 USC § 1407 and sought to provide a doctrinal basis for avoiding their fiduciary duties to absent class members by creating a quasi-class action. The Fifth Circuit is the first federal appellate court to review such an agreement with approval, albeit without passing on its legality by skirting that issue based on its erroneous conclusion petitioners did not have standing to challenge the MSA by classifying to them as "non-settling plaintiffs." (App.2a.)

II.

THE JUDICIALLY CREATED QUASI-CLASS ACTION CONTRAVENES ARTICLE III OF THE UNITED STATES CONSTITUTION AND RULES ENABLING ACT, AND DEPRIVES PETITIONERS OF THEIR CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TRIAL BY JURY.

Only two years after *Amchem* another settlement class came before the Court in the context of a limited fund rationale seeking certification pursuant to

Fed.R.Civ.Pr. 23 (b) (1) (B), and the Court stated it should be obvious after *Amchem* that classes with diverse interests must be divided "into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856, 119 S.Ct. 2295, 2319, 144 L.Ed.2d 715 (1999). The district court below expressly recognized the wide and diverse interests among the litigants in MDL 1567 in its decision denying class certification the year before the MSA was announced. *In re Vioxx Prods. Liab. Litig.*, 239 F. R. D. 450 (E. D. La. 2006). Yet, there should be no doubt that when the district court appointed the NPC to negotiate with Merck on behalf of the wide and diverse group of litigants with actions pending in the United States, the settlement talks were to be aimed at crafting a national settlement that would provide an administrative compensation regime for all pending Vioxx personal injury actions in this country.

It is equally clear the product of the negotiations between Merck and the NPC bears all the hallmarks of legislation including extinguishment of claims otherwise viable under the tort laws of the states. It turned the adversarial system topsy-turvy with lawyers purportedly representing the litigants turning against them and joining Merck in opposing the efforts of plaintiffs seeking relief from PTO 28. It reached well beyond other global settlements achieved outside the parameters of Rule 23 by jettisoning a fundamental armament of the adversarial system, the ability of a litigant to rely on independent judgment of their counsel.

The Fifth Circuit erred in the first instance by classifying petitioners as non-settling parties when in fact they were absent class members. This error was then compounded by building one fiction on top of another, namely, ruling the MSA is a private opt-in agreement – which it is in name only – and, secondly, that plaintiffs who agreed to its terms did so voluntarily and intelligently. In addition to fiction-building, Merck confronted *Amchem* head-on by arguing in the Fifth Circuit that petitioners' approach, namely, adhering to Rule 23, "would essentially sound the deathknell for most mass tort settlements." Brief of Appellee Merck, Case 09-30446, Document 0051948715, at p. 26.

Indeed, Merck sought to characterize the playing field as petitioners demanding their day in court when in fact this was never the case since petitioners only demanded the court adhere to the fiduciary duties mandated by Rule 23 and did not in any respect deny the fact that a representative suit may be an appropriate vehicle to resolve their claims.[8] The importance of the issues raised by petitioners is that, absent this Court

8. *Id.*, at p. 27. Ironically, Merck pointed to notice difficulties in class actions stating the obvious fact that due process protections can never ensure even those members who receive notice will either read or understand it. It is ironic because the only information these class members received came after the MSA was a *fait accompli* and it was aimed not at individual litigants but their counsel, namely, the definitions section of PTO 28. In marked contrast to Rule 23's requirement that class members be given the best notice practical under the circumstances, PTO 28 stated loud and clear that any plaintiff with a cardiovascular injury other than heart attack, ischemic stroke or sudden cardiac death should not expect any

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putting a halt to the trend described herein, the federal courts will be able to create *de facto* class actions at will outside the strictures of Rule 23. The practical effect may be seen in the instant litigation in that it empowers defendants, who are inevitably large-scale corporations, to use their wealth and resources to dictate the terms of settlement.[9]

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compensation in this litigation. Rule 23's notice requirement is also turned topsy-turvy in that instead informing class members of their rights, PTO 28 informed their counsel they had no rights. See, e.g., *In re Nissan Motor Corp. Antitrust Litig.*, 552 F. 2d 1088, 1104-05 (5th Cir. 1977) [The notice "must also contain an adequate description of the proceedings written in objective, neutral terms, that, insofar as possible, may be understood by the average absentee class member."] To the extent one does not interpret PTO 28 section III as an extinguishment of claims, it unmistakably tilts the notice decidedly in favor of Merck.

9. *See, e.g.* Prof. Wolfram's conclusion "no system of professional ethics could assuredly keep the lawyers conduct within acceptable realms when the riches of Croseus on how about as a reward to any lawyer with the client, money, skill and pluck to try. Charles W Wolfram, *Mass Torts-Messy Ethics*, 80 CORNELL L.REV. 1223, 1228 (1995). Although there is no record to determine the extent of the trade-offs made in this litigation, the PSC did state: "Initially, Merck would only negotiate cases in which a myocardial infarction (MI) was alleged to have been caused by Vioxx ingestion. After more than eight months of negotiation, the substantive talks were modified to also cover ischemic strokes (IS) alleged to have been caused by Vioxx ingestion. MDL Rec.Doc. 13370, at 2. Although it is not clear if this coincided with Merck's agreement to include $480 million in attorneys fees, in *Ortiz*, this Court observed that, with "an already enormous fee within counsel's grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant." *Id.*, 527 U.S. at 853 n.30, 119 S.Ct. at 2318 n.30.

Indeed, the concern about empowering wealthy litigants goes back to colonial times as reflected by the following arguments asserting the right to trial by jury should be included in the Constitution:

> The powers of the court of equity, vested by this Constitution, and the tribunals of Congress; powers which did not exist in Pennsylvania unless so far as they can be incorporated with jury trial, in this state, greatly contribute to this event. The rich and wealthy suitors would eagerly lay hold of the infinite mazes, perplexities and delays, which a court of chancery, with the appellate Palace of the Supreme Court in fact as well as law would furnish him with, and thus the poor man being plunged into the bottomless pit of legal discussion, would drop his demand and despair.

Dissent of the Minority of the Pennsylvania Convention, December 18, 1787, *The Debate on the Constitution, Federalist and Anti-federalist Speeches, Articles and Letters During the Struggle over Ratification, Part One*, Penguin Putnam Inc., p. 540.

Fast-forward some two centuries and petitioners find themselves in precisely the position described above with the merits of their claims submerged by the district court for failure to adhere to a discovery order engineered by Merck and subsequently approved by the Court of Appeals through its erroneous interpretation of this Court's standing doctrine. Indeed, in *Amchem* this Court instructed the safeguards provided for by

rule (a) and (b) were set for the protection of absent class members and serve to "inhibit appraisals of the chancellor's foot kind" at 521 U.S. at 621, 117 S.Ct. at 2248. Since there is precious little in the record which permits any substantive review of the settlement achieved below, the result obtained permits the inference the power of the purse had an influence in letting a wealthy defendant get out cheap.

In *Taylor v. Sturgell*, 553 U.S. 880, 128 S.Ct. 2161, 171 L.Ed.2d 155 (2008), this Court held the due process clause prohibited a judgment entered against one person seeking information under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, to bind a different party seeking the identical information absent either an agreement or evidence of collusion between the two requesters. *Id.*, 553 U.S. at 885, 128 S.Ct. at 2167-68. This Court held that to invoke collateral estoppel against a subsequent party would amount to developing a doctrine of virtual representation that would enable courts to "'create a *de facto* class action at will.'" *Id.*, 553 U.S. at 901, 128 Ct. at 2176, quoting *Tice v. American Airlines, Inc.*, 162 F.3d 966, 973 (7th Cir. 1998). Here, the district court's appointment of the NPC to represent the divergent interests of the litigants with personal injury actions pending throughout the United States in negotiations with Merck is similarly based on a virtual representation doctrine that circumvents due process here by avoiding the strictures of Rule 23.[10]

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10. The only alternative basis upon which to rest the district court's conferring authority to bargain upon a small group of attorneys is the equally impermissible foundation of the district court's "gestalt judgment or overarching impression of the

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Petitioners submit Judge Kozinski astutely identified a similar trend, namely, "a remarkable power grab by federal judges who have parlayed a narrow grant of authority to conduct consolidated discovery into a mechanism for systematically denying plaintiffs the right to trial in their forum of choice." *In Re: American Continental Corporation/Lincoln Savings & Loan Securities Litigation Lexecon Inc., v. Milberg Weiss Bershad Hynes & Lerach*, 102 F.3d 1524, 1540 (9th Cir. 1996) [dissenting op.]. Ten years later, the Ninth Circuit stated because "multidistrict litigation is a special breed of complex litigation where the whole is bigger than the sum of its parts," the district court necessarily had to enjoy broad ranging discretionary authority to manage litigation. *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1232 (9th Cir. 2006).

In *In re Patenaude*, 210 F.3d 135, 142-146 (3d Cir. 2000), the Third Circuit relied upon this Court's decision in *Lexecon* to interpret the terms "coordinated or consolidated" broadly in holding the transferee court enjoyed wide discretion in managing all pretrial proceedings [rejecting remand motions based on

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settlement's fairness." *Amchem*, 521 U.S. at 621, 117 S. Ct. at 2248. The district court below on several occasions sought to explain the significant effort by both the court and negotiating counsel to achieve settlement which it clearly believed was fair. Petitioners respectfully submit, as the Third Circuit explained, "without determining that the class was adequately represented, the district judge has no real basis for assuming that the negotiations satisfactorily vindicated the interests of all absentees" . *In re General Motors Corp. Pick Up Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 797 (3rd Cir. 1995).

premise settlement negotiations, even if not involving the individual cases seeking remand, were nevertheless pretrial proceedings that warranted denying remand].

Perhaps the broadest description of the authority enjoyed by a transferee court was Judge Fallon's recitation that: "In reality, there is only one true limit on a transferee court's authority, namely, that a transferee court cannot unilaterally transfer cases to itself for trial." Fallon, et al., *supra*, 82 TUL.L.REV. at 2328.

The reservoir of managerial authority a transferee court necessarily delegates to counsel to move the litigation forward has allowed capable defense counsel to shape the factual scenarios to create a legal web enabling them to employ any number of doctrines to ensure any recalcitrants do not reach the courthouse steps on the merits of their claims, but rather become entangled in a web woven for the express purpose of shielding the final resolution achieved without the benefit of adversarial investigation rendering any judicial review wholly illusory.[11] This is especially the case by the time all counsel have achieved an agreement such as the MSA, at which point they present a unified

11. Prof. Leubsdorf, describing the evolution of class actions, characterized the third stage as where the defendants and their lawyers begin to manipulate class actions for their own benefits, asserting "the class-action, in short, has always been up for grabs. Whether it helps the powerless or the powerful, whether it makes remedies available or extinguishes them, will depend on the choices that lawyers, scholars, judges and legislators make." John D. Leubsdorf, *Co-opting the Class-Action*, 80 CORNELL L. REV. 1222, 1227 (1995).

position to the court, opposing absentees and any others who seek to challenge the result they achieved. The district court is hampered by both lack of adversarial presentation on the one hand and hydraulics of moving a large-scale settlement such as the one at bar.

These machinations virtually guarantee one or another legal doctrine will be invoked to dispose of recalcitrants without reaching the merits of their claims. *See Amchem, supra,* observing "the court would face a bargain proffered without benefit of adversarial investigation" and the "parties 'may even put one over on the court, in a staged performance'...." *Id.*, 521 U.S. at 621, 117 S.Ct. at 2249, quoting Judge Easterbrook's dissent from denial of a rehearing *en banc* in *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1352 (7th Cir. 1996).

It therefore should be no surprise the MSA has been hailed as a "tremendous victory for Merck, because the company's potential liability exposure was projected to be substantially higher." *See* Frank M. McClellan, *The Vioxx Litigation: A Critical Look at Trial Tactics, the Tort System, and the Roles of Lawyers in Mass Tort Litigation,* DEPAUL L.REV., Vol. 57:509, 510 n.6 (2008) [noting Wall Street had previously estimated Vioxx would cost Merck as much as $25 billion to settle]. Indeed, currently there is little substantive basis for reviewing either the reasonableness or fairness of the MSA, not merely in terms of dollar amount but with respect to the fact that more than one third of the natural class of litigants with personal injury actions

pending in the United States as a result of Vioxx ingestion were excluded from any compensation.[12]

In *Ortiz* this Court indicated it was "a fair question how far a natural class may be depleted by prior dispositions of claims and still qualify as a mandatory limited fund class[.]" *Id.*, 527 U.S. at 854, 119 S.Ct. at 2319. Although it is difficult, if not impossible, to discern how many potential litigants were dissuaded by PTO28's definitions section from commencing or discontinuing suits that had been filed, there is some concrete proof some 34.13% of the class who entered the compensation regime created by the MSA received nothing. Judge

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12. The fact that Merck won the majority of cases early on in the litigation is clearly offset by the fact that when plaintiff verdicts did come in they were multimillion dollar verdicts with significant punitive damages included. *See* McClennan, *supra*, 57 DEPAUL L.REV. At 510, n.5. Moreover, most defense wins were centered on the individual plaintiff's inability to prove specific causation so that, given Merck's inability to convince juries its conduct was proper as the litigation matured, there was substantial likelihood plaintiff verdicts would increase. *Id.* The district court below concluded that by the time the Vioxx settlement was announced the instant litigation was "an extremely mature litigation." PTO 29 section III. C. In fact, the litigation had few of the hallmarks of mature litigation since none of the cardiovascular injuries other than heart attacks or strokes were presented to the juries and litigation stopped before plaintiffs' counsel developed sufficient experience to defeat the sophistry offered by Merck to muddy the water on individual causation. *See, e.g.*, Francis E McGovern, *Resolving Mature Tort Litigation*, 69 B.U. L. Rev. 659, 659 (1989) [describing a mature tort as one where "there has been full and complete discovery, multiple verdicts, and persistent vitality in plaintiffs contentions."]

Fallon recently observed that some $4,353,152,064 was paid out to 32,886 out of 49,893 eligible and enrolled plaintiffs. *See* Judge Fallon's 10/19/10 Order & Reasons, MDL Rec.Doc. 54040, at p. 8. These numbers do not include plaintiffs such as petitioners herein who have been subject to the assembly line motions to dismiss arising from PTO 28.[13] In *Ortiz* this Court made clear the settlement class would not qualify "when, in the very negotiations aimed at a class settlement, class counsel agree to exclude what may turn out to be as much as a third of the claimants that negotiators thought might eventually be involved, a substantial number of whom class counsel represent." *Id.*, 527 U.S. at 819, 119 S.Ct. at 2301.

Petitioner submits the instant case breathes real meaning into the concerns this Court observed in both *Amchem* and *Ortiz* and especially its conclusion that settlement classes require "heightened attention." *Ortiz, supra*, 527 U.S. at 849, 119 S.Ct. at 2316, citing *Amchem, supra*, 521 U. S. at 620. Judge Fallon may well be correct in his contention that, ""By virtue of the temporary national jurisdiction conferred upon it . . . the transferee court is uniquely situated to preside over global

13. Indeed, Rule 41(b) was used below to dismiss plaintiffs' cases with prejudice based on Merck's motions citing partial deficiency in complying with the extensive requirements for disclosures and certifications set forth in PTO 28, thus sidestepping Rule 37. It is respectfully submitted this practice is not favored or warranted. *See Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 207, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958); *see also Sentis Group, Inc., Coral Group, Inc. v. Shell Oil Co.*, 559 F.3d 888, 899 (8th Cir. 2009).

settlement negotiations" providing a "'once-in-a-lifetime' opportunity." Fallon, et al., *supra*, 82 TUL.L.REV. at 2340. It is, however, an argument that must be directed to Congress since there is no doctrine that can emanate from 28 USC §1407 that would provide a rationale for the district court employing its managerial authority to morph into overall resolution of class actions. In light of the same, the doctrinal basis underlying district court's authority to bring about settlement such as the one at bar was set forth by Judge Weinstein namely, quasi-class action.[14] Petitioners preface their discussion of the quasi-class action with the Fifth Circuit's decision they do not have standing to challenge the MSA.

Although petitioners were parties in MDL 1567 they were not parties to the negotiations that resulted in the MSA. After binding some 99.9% of litigants with personal injury actions pending in the United States (*see* Judge Fallon's 10/19/10 Order & Reasons, MDL Rec.Doc. 54040, at p.8), it should be hard to swallow Merck's argument that:

> The MSA is not a class settlement that resolve the specified group of claims unless members of the group affirmatively opt out of the deal; instead, it is a private, opt – in settlement that binds only those who take affirmative steps to accept the defendant's offer. Rule 23 does not apply.

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14. *In re Zyprexa Product Liab. Litig.*, 424 F. Supp 2d 488 (EDNY 2006).

Merck Brief, *supra*, at p.23. Yet, the Fifth Circuit did precisely that by holding:

> Because the MSA was structured as an "opt-in" private settlement rather than an "opt-out" agreement the Dier plaintiffs cannot show that they have suffered the type of legal prejudice that would afford them standing to challenge the MSA.

(App. 8a.)

The record below demonstrates among the reasons class certification was denied was the district court's finding that the named representative could not meet the adequacy of representation requirement which *Amchem* made clear required the exercise of the court's fiduciary duty to determine whether the "the interests of the class members will be fairly and adequately protected in their absence." *Amchem, supra*, 521 U.S. at 626, 117 S.Ct. at 2251, quoting *General Telephone Co. of Southwest v. Falcon*, 457 US 147, 157, n.13, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982). Nothing changed about the inherent characteristics of class members or the nature of their personal injury claims – a plain fact the Fifth Circuit elected to disregard when mischaracterizing petitioners as non-settlers.[15]

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15. Petitioners bear none of the characteristics of so-called non- settlers in that they had no clue about negotiations regarding the MSA until it was presented as a *fait accompli*. As such they more closely resemble absent class members rather than non-settlers. *See, e. g.*, the Seventh Circuit's observation that: "Unnamed members of the class rarely will suspect a

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Although the Fifth Circuit apparently viewed the limiting of compensation to heart attacks, ischemic strokes and sudden cardiac death, together with the environment created by the quartet of orders that sprang up simultaneous with the MSA, as "'mere allegations of injury in fact or tactical disadvantage'" (App. 8a, quoting *Agretti v. ANR Freight Sys.*, 982 F.2d 242, 247 (7th Cir. 1992), it would never have reached this conclusion but for its erroneous characterization of petitioners' status. If petitioners were properly treated as absent class members it would not have been necessary to reach the aftermath created by the negotiations between Merck and the NPC. Indeed, this Court's decision in *Northeastern Florida Chapter Associated Gen. Contractors of America v. Jacksonville*, 508 US 656, 113 S.Ct. 2295, 124 L.Ed 2d 586 (1993), would have governed the facts and circumstances petitioners presented here. In *Northeastern Florida Chapter* contractors mounted a challenge to being excluded by the city from being able to participate in the bidding process and this Court held it was not the fact that they did not secure the contract that was the injury sustained but rather, "the 'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of a contract." *Id.*, 508 U.S. at 666, 113 S.Ct. at 2303.

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shortfall in the adequacy of representation before learning of the terms of a (potentially inadequate) settlement or problems in the class definition - and given the possibility of opt-out, even that may not occasion intervention.". *Crawford v. Equifax Payment Services*, 201 F.3d 877, 880-81 (7th Cir. 2000).

In *Ortiz* this Court made clear that reviewing whether or not Rule 23's protection should be afforded a court will look at practicalities including circumstances where the ability of the class or subclass to protect its own interests has been impaired. In viewing the issue of injury this Court has previously made clear that, although "the constitutional component of standing doctrine incorporates concepts concededly not susceptible of precise definition," injuries "cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise. " *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3325, 82 L.Ed.2d 556 (1984). It is hard to see how being excluded from the bargaining table which generates the very agreement in which plaintiffs' claims are being traded off is not an injury. This is wholly aside from the creation of regime which restricts compensation of cardiovascular injuries otherwise viable and tort system to heart attacks, ischemic strokes and sudden cardiac death and then builds in an enforcement mechanism by placing individually retained plaintiff"s counsel in a financial vise can be considered an injury that is "too abstract, or otherwise not appropriate, to be considered judicially cognizable...." *Id.*, 468 U.S. at 752, 104 S.Ct. at 3325. Here, there is cognizable injury which can be established aside from the legal environment created by PTOs 28-31.

Petitioners submit the challenged action here is the district court's failure to adhere to its fiduciary duty and protect petitioners' interests in the negotiations that culminated in the MSA.[16] As such it is clear injury

16. Any notion petitioners did not suffer deprivation of a substantive right should be flatly rejected even though the

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can ultimately be traced to Merck who devised the strategy leading up to the MSA. Therefore, there exists a likelihood the injury will be 'redressed by a favorable decision.' *Lujan v. Defenders of Wildlife*, 504 US 555, 560-61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) [citation omitted].

III.

THE IMPORTANT QUESTION OF WHETHER THE "QUASI-CLASS ACTION" CONTRAVENES ARTICLE III AND THE RULES ENABLING ACT HAS NOT BEEN AND SHOULD BE SETTLED BY THIS COURT

Petitioners assert that the quasi-class action doctrine should be rejected because it not only contravenes the Article III constraints upon federal courts but violates the Rules Enabling Act which instructs that rules of procedure "'shall not abridge, enlarge or modify any substantive right, 28 USC [[2072 (b).'" *Amchem, supra*, 521 U.S. at 613, 117 S.Ct. at 2244.

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district court's duties may be characterized as procedural in nature. Prof. Richard L. Marcus has observed that particularly in federal mass tort litigation 'almost from the beginning, we have known that the distinction between substance and procedure can be as elusive as it is critical' 'substance' and 'procedure' are the same key-words to very different problems. Neither 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used." Richard L. Marcus, *Symposium: A Market Approach to Tort Reform Via Rule 23, May, 1995*, 80 CORNELL L. REV. 909, quoting *Guarantee Trust Co. v. York*, 326 US 99, 108, 65 S.Ct. 1464 (1945).

Although there are less than a handful of district courts that have subscribed to the newly created quasi-class action at least one commentator has taken the position that is sufficient to characterize the same as an "emerging doctrine that MDLs are 'quasi-class actions.'" Charles Silver and Geoffrey P. Miller, *"The Quasi-Class Action Method of Managing Multidistrict Litigations: Problems and a Proposal"* (2009), New York University Law and Economics Working Papers. Paper 174, p. 7. The authors offer suggestions on managing an MDL for purposes of achieving global resolutions without a passing glance at Article III, let alone due process and Seventh Amendment rights that become submerged in an administrative labyrinth when judges function as managers rather than their true role as impartial adjudicators of disputes. Nevertheless the authors note concerns about the management of MDLs:

> By managing MDLs as they have, judges have compromised their independence, created unnecessary conflicts of interest, ridden roughshod over attorneys, turned a blind eye to questionable behavior, and weakened plaintiff lawyers' incentives to faithfully serve their clients.

Id., at p. 4. The author's concerns in many respects mirror the dangers inherent in settlement only classes which this court enunciated in both *Amchem* and *Ortiz*.

Petitioners submit the instant litigation demonstrates the quasi-class action doctrine affords no basis for judge to exercise any adjudicatory function in presiding over such a litigation and this is best reflected

by the fact that in each of the cases invoking the doctrine the courts did not do so until the tail end of the litigation when they were addressing attorney fee issues. *In re Zyprexa Prods. Liab. Litig.*, 238 F. R. D. 539 (E.D.N.Y. 2006); *In re Guidant Implantable Defibrillators Prod. Liab. Litig.*, 2008 WL 682 174 (D. Minn. 2008); *In re Vioxx Prods. Liab. Litig.*, 574 F.Supp.2d 606 (E.D.La. 2008). Although never mentioned directly in the decisions, they are bottomed on the view that the day in court principle has gone the way of the dodo bird.

The seminal decision on quasi-class actions is Judge Weinstein's opinion in *In re Zyprexa Prods. Liab. Litig.*, 424 F.Supp.2d 488, 491 (E.D.N.Y. 2006), in which he rules:

> While the settlement in the instant action is in the nature of a private agreement between individual plaintiffs and the defendant, it has many of the characteristics of a class action and may be properly characterized as a quasi-class action subject to general equitable powers of the court.

In a series of decisions later the same year, Judge Weinstein invokes this doctrine by judicial fiat, flatly asserting:

> Like many MDL cases, the instant action can, as a practical matter, be characterized as a quasi-class action.

In re Zyprexa Prods. Liab. Litig., 238 F.R.D. 539, 540 (E.D.N.Y. 2006), citing *In re Zyprexa Prods. Liab.*

Litig., 451 F.Supp.2d 458, 2006 WL 2590402 (E.D.N.Y. 2006), and *In re Zyprexa Prods. Liab. Litig.*, 233 F.R.D. 122 (E.D.N.Y. 2006). Judge Weinstein did nothing more than describe characteristics of an MDL and then baldly assert they provided the foundation for the doctrine of quasi-class action. *Id.*, at p 4. This is described by Prof. Issacharoff as follows:

> As initially formulated by Judge Weinstein, the salient features of the quasi-class action were, "[t]he large number of plaintiffs subject to the same settlement matrix approved by the court; the utilization of special masters appointed by the court to control discovery and to assist in reaching and administering a settlement; the court's order for a huge escrow fund; and other interventions by the court."

Samuel Issacharoff, *Private Claims, Aggregate Rights*, 214 SUPREME COURT REV. 183, 215, n.102 (2008). Indeed, Prof. Issacharoff's observation perhaps captures the reason the notion of quasi-class-action is elevated to the status of a doctrine rather than a decision by judicial fiat which does not rest on anything more than raw judicial power, namely, Judge Weinstein's prominence in the field. Prof. Issacharoff states:

> As applied to harm cases by the indefatigable Judge Jack Weinstein, the term refers to a coordinated group of related cases whose joint supervision and aggregate resolution are subject to direct oversight and implementation by a court, usually an MDL court.

Id., 215. Indeed, Judge Weinstein has been called "a living legend." Silver, et al., *The Quasi-class Action Method of Managing Multidistrict Litigations: Problems and a Proposal*, (2009), *supra*, p.7 n.23.

Judge Weinstein initially[17] advanced his position in a proper forum, namely a law review article, as follows: "It is my conclusion... that mass consolidations are in effect quasi-class actions." Jack B Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW.U.L.Rev. 469, 480-81 (1994). Judge Weinstein characterizes this Court's decisions in *Amchem* and *Ortiz* as a

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17. Judge Weinstein has held the view that due process must be subordinated to the public interest implicated in mass torts even before he became a judge in that, in 1960, then Professor Weinstein wrote:

> The class-action constitutes an exception to two important principles of our procedure law: each person is free to determine whether, when and how to enforce the substantive rights; each person is entitled to his day in court before his rights are affected by a judgment. Powerful as they are, the abstract objections to being down by the action of others yielded long ago in bills of peace, to the practicalities of life and law, to the need to afford an effective remedy for the protection of rights and to the reduction of repetitive litigation. In class actions necessity makes due process.

Jack B. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFFALO L. REV. 433, 433-34 (1960). More recently, Judge Weinstein has written that the day-in-court rationale "had more force in the era of the horse and buggy." Jack B Weinstein, *Preliminary Reflections on Administration of Complex Litigations*, 2009 CARDOZO L.REV. DE NOVO 1, 14 (2009).

> . . . development [that] has led a number of judges and attorneys, particularly in pharmaceutical cases, to attempt mass settlements on a consolidated and cooperative basis without the formalities of a class action. The substitute quasi-class action aggregate technique has advantages and is being closely studied.

In re Zyprexa Prods. Liab. Litig., supra, 238 F. R. D. ast 541 [citation excluded]. As the instant litigation adequately reflects this amounts to leaving the lawyers wide latitude to reach global solutions with informal supervision at best only to have the final solution be presented as unified front. Defense counsel walk a straight line and can clearly be seen fit to act in the finest traditions of the profession when they seek to get the client office cheap as possible. They do so without the conflicting position plaintiffs' counsel find themselves facing multiple conflicts with regard to clients who have diverse interests, if indeed they have any actual clients, as well as their own financial interest which is implicated when a defendant such as Merck whips out the pot of gold that awaits them upon conclusion of the final resolution.[18]

It is interesting to note that Judge Weinstein has viewed the Class Action Fairness Act of 2005 ("CAFA") as "a good example of legislative efforts to allow mass national litigation to proceed on a consolidated basis in a single forum." *Zyprexa, supra*, 238 F.R.D. at 541.

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18. Here that conflict was built right into the MSA via section 1.2.8 cited with approval by the Fifth Circuit. (App. 4a.)

Perhaps. However, an equally compelling view was set forth by Judge Young, who wrote:

> It is precisely because MDL practice is perceived so clearly to favor the defense that Congress appears to have lost confidence in a judicial management mechanism that once had such great promise. The Class Action Fairness Act of 2005, Pub.L. No. 109-2, 119 Stat. 4 (2005), itself thought to be legislation that favors business defendants, *see Natale v. Pfizer, Inc.*, 379 F.Supp.2d 161, 164-68 (D.Mass.2005), contains an unmistakable rebuke to the Panel on Multi-District Litigation in Section 4, which provides that no class action removed to federal court under its provisions shall thereafter be transferred to another district pursuant to Title 28, Section 1407(a) of the U.S.Code without the request of a majority of plaintiffs.[ ] *See* Pub.L. No. 109-2, 119 Stat. 4, 11-12 (2005) (codified at 28 U.S.C. § 1332(d)(11)(C)(i)).

Delaventura v. Columbia Acorn Trust, 417 F.Supp.2d 147, 156 (D.Mass. 2006) [footnote omitted]. The debate raging among commentators is unlikely to calm down anytime soon; however, one thing is certain, this court is unlikely to have the opportunity to act in the context of the mass tort while still able to reverse a result that effectively closed the courthouse door to countless class members without ever reaching the merits of the claims.

The procedural safeguards mandated by Rule 23 combine with the court's fiduciary duty to absent class members to act as a shield against the machinations of sophisticated defense counsel who walk the straight line of getting the client off as cheap as possible, have the riches of Croseus to fund their machinations, the burgeoning vastness of MDL landscape to perform their machinations without benefit of adversarial judicial investigation or review, and hapless class members on the other side who are either underrepresented, unrepresented, or as here, represented by attorneys who had been placed in a irreconcilable conflict through the financial vise of losing fees for their entire inventories absent recommending to their clients they accept the MSA and enter the Vioxx Resolution Program, which was a pig in a poke for some while for more than one-third of them just an empty poke.

CONCLUSION

Based on the foregoing, this Court should issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the final judgment by that court.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JULY 16, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-30446

IN RE: VIOXX PRODUCTS LIABILITY LITIGATION

GLENN L. DIER, ET AL.,

Plaintiffs - Appellants

v.

MERCK AND COMPANY, INC.,
A Foreign Corporation,

Defendant - Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:05-MD-1657

Before GARWOOD, STEWART, and CLEMENT, Circuit Judges. PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appendix A

In this mass tort multidistrict litigation (MDL) proceeding, thousands of plaintiffs alleged personal injuries resulting from the use of Vioxx, a drug manufactured by defendant Merck and Company, Inc. (Merck). Many of the litigants have arrived at an opt-in Master Settlement Agreement (MSA) to resolve claims for those plaintiffs who meet certain criteria. Glenn L. Dier and his fellow plaintiffs-appellants (the Dier plaintiffs) have not opted into the MSA. The district court issued a series of pre-trial orders, including pre-trial order 28 (PTO 28), which required that non-settling plaintiffs each produce a report from a doctor linking the alleged injury to use of Vioxx. The district court issued a show cause order for the Dier plaintiffs' failure to comply with PTO 28 and later dismissed the Dier plaintiffs' cases on that basis. We AFFIRM.

I. FACTUAL AND PROCEDURAL BACKGROUND

In September 2004, Merck withdrew Vioxx from the market when data revealed an increased risk of cardiovascular thrombotic events associated with the drug. *See In re Vioxx Prods. Liab. Litig.*, 401 F. Supp. 2d 565, 571 (E.D. La. 2005). Litigation soon followed and thousands of claims were filed around the country. *Id.*

1. Multidistrict Litigation

In February 2005, the Judicial Panel on Multidistrict Litigation ordered that the Vioxx litigation be "centralized, designated as an MDL, and assigned to" Judge Eldon Fallon. *Id.* Judge Fallon then directed the parties to address whether a class of personal injury plaintiffs could be certified under Rule 23. In November

2006, he denied certification of a nationwide class because the plaintiffs' claims raised choice-of-law hurdles and numerous individualized questions of fact. *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 458–59, 461 (E.D. La. 2006).

2. The Master Settlement Agreement

Settlement negotiations resulted in the MSA, which the parties presented to the district court on November 9, 2007. The MSA established threshold criteria for plaintiffs' eligibility to opt in. Section 1.2.8 of the MSA imposed the requirement that any plaintiffs' counsel enrolling clients in the MSA must affirm that she had recommended to 100% of her clients that they accept the terms of the MSA and must attempt to withdraw from representing clients who refused to accept the MSA terms. The MSA also designated Judge Fallon as its chief administrator.

3. The Pre-trial Orders

On November 9, 2007 the district court entered several pre-trial orders with respect to the claims of those plaintiffs who could not or chose not to participate in the MSA. PTO 28[1] required non-settling plaintiffs to notify their healthcare providers that they must

1. PTO 28 is characterized as a *Lone Pine* order, named for *Lore v. Lone Pine Corp.*, No. L-33606-85, 1986 WL 637507 (N.J. Super. Ct. Law Div. Nov. 18, 1986). "*Lone Pine* orders are designed to handle the complex issues and potential burdens on defendants and the court in mass tort litigation." *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 340 (5th Cir. 2000).

preserve evidence pertaining to the plaintiffs' use of Vioxx. Plaintiffs were also required to produce pharmacy records and medical authorizations, answers to interrogatories, and a Rule 26(a)(2) report from a medical expert attesting that the plaintiff sustained an injury caused by Vioxx and that the injury occurred within a specified time period. Failure to comply could result in dismissal of the plaintiffs' claims with prejudice.[2]

Pre-trial order 30 (PTO 30) imposed a stay of discovery so that plaintiffs could consider the MSA, with exceptions for discovery activities required by PTO 28 and previously scheduled *de bene esse* depositions. Pre-trial order 31 (PTO 31) enforced the terms of Section 1.2.8 of the MSA by requiring all counsel of record for plaintiffs to register all claims in which they had an interest and sign a "Registration Affidavit," in which they had to attest to whether they agreed to the terms of the MSA and would recommend that their clients enroll in the MSA.

4. Dier Plaintiffs' Dismissal

The Dier plaintiffs brought their Vioxx suits against Merck in state and federal courts in New York. Each case was then transferred to the MDL. The Dier plaintiffs have not opted into the MSA.

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2. Pre-trial Order 29 (PTO 29) is virtually identical to PTO 28, differing primarily because it applies to plaintiffs whose claims were transferred to the MDL after November 9, 2007 and therefore sets different deadlines.

Appendix A

Shortly after the MSA was announced and the pre-trial orders were entered, a group of plaintiffs (the Oldfather plaintiffs) filed a motion in the district court requesting modification or suspension of PTO 28 on the basis that its requirements were premature and unfairly burdensome. The district court rejected the Oldfather plaintiffs' arguments, but nonetheless extended the deadlines for PTO 28 "to ensure that all Plaintiffs have a fair opportunity to comply with this provision of PTO 28." *In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741, 745 (E.D. La. 2008).

One month after the Oldfather ruling, in June 2008, another group of plaintiffs (the Agard plaintiffs)[3] filed a motion making substantially the same arguments as the Oldfather plaintiffs in opposition to PTO 28. They requested another extension and sought to eliminate the expert report requirement of PTO 28. The Agard plaintiffs also argued that Judge Fallon's roles as MSA chief administrator and as coordinating judge of the MDL proceeding created an incurable conflict of interest, requiring Judge Fallon to resign as MSA administrator. They further asserted that the MSA should be vacated or declared void because it had not been subject to the requirements of Rule 23. In December 2008, the district court denied the Agard motion in its entirety.

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3. The Agard plaintiffs were also represented by the Law Office of Ronald R. Benjamin, counsel for the Dier plaintiffs. The Agard plaintiffs included some of the Dier plaintiffs.

Appendix A

In October 2008, the district court entered an order (the Conference Order) instructing eligible but non-settling plaintiffs to appear at one of three conferences to be held in different locations nationally. The stated purpose of the order was "to ensure that plaintiffs who are eligible for the Vioxx settlement program but who have not enrolled in the program . . . have all necessary information available to them so that they can make informed choices." The order directed counsel and plaintiffs themselves to appear in person at one of the conferences, although it expressly allowed plaintiffs to avoid this requirement for reasons of "physical or economic hardship." Many of the Dier plaintiffs claimed hardship and were excused from attendance. The Dier plaintiffs also moved the district court to vacate the order, contending that the only conceivable purpose of the conferences was for the court to engage in "advocacy for the settlement in an environment that is necessarily going to be viewed as coercive by the individual plaintiffs." The district court denied the motion.

In November 2008, Merck moved for an Order to Show Cause as to sixty-one plaintiffs (including the Dier plaintiffs) for "failure to provide a case-specific expert report as required by . . . PTO 28." In December 2008, the district court issued an Order to Show Cause. The Dier plaintiffs filed responses, arguing that they were in substantial compliance with PTO 28 and that New York law only required general causation proof. In April 2009, the district court dismissed the Dier plaintiffs' complaints with prejudice for failure to comply with PTO 28.

II. DISCUSSION

A. Standing to Challenge the MSA

The Dier plaintiffs first challenge the validity of the MSA. Standing, however, is a prerequisite to this court's exercise of jurisdiction. *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 496 n.1 (5th Cir. 2007) (en banc). This court has recognized that, in the context of class settlements, non-settling parties generally have no standing to challenge the settlement. *Transam. Refining Corp. v. Dravo Corp.*, 952 F.2d 898, 900 (5th Cir. 1992); *see also Agretti v. ANR Freight Sys.*, 982 F.2d 242, 246 (7th Cir. 1992) ("'[N]on-settling defendants in a multiple defendant litigation context have no standing to object to the fairness or adequacy of the settlement by other defendants.'") (quoting 2 HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 11.54 (2d ed. 1985)). The rationale behind this general rule is that settlement will not affect any substantive legal rights of non-settling parties. *Transam. Refining Corp.*, 952 F.2d at 900.

An exception to the general rule may apply if the settlement agreement strips non-settling parties of rights to contribution or indemnity, *see id.*, or in some other manner results in "plain legal prejudice" to a non-settling party. *Agretti*, 982 F.2d at 246–47; *see also Bass v. Phoenix Seadrill/78, Ltd.*, 749 F.2d 1154, 1160 n.10 (5th Cir. 1985) (stating that the court may consider "an attempt by a non-party to the settlement to void portions of the agreement that purport to affect the

rights of non-settlors"). But "[m]ere allegations of injury in fact or tactical disadvantage as a result of a settlement simply do not rise to the level of plain legal prejudice." *Agretti*, 982 F.2d at 247.

Because the MSA was structured as an "opt-in" private settlement rather than an "opt-out" agreement, the Dier plaintiffs cannot show that they have suffered the type of legal prejudice that would afford them standing to challenge the MSA. The Dier plaintiffs therefore lack standing to challenge the MSA.

B. Judge Fallon's Decision to Not Recuse

The Dier plaintiffs contend that Judge Fallon cannot serve as both presiding judge in the Vioxx MDL and chief administrator of the MSA without presenting the appearance of partiality. They assert that Judge Fallon's dual roles "clearly permit[ ] an inference" that he encouraged participation in the MSA. Therefore, they argue, Judge Fallon must either recuse himself from the case or resign as chief administrator of the MSA.

Addressing the Dier plaintiffs' contentions in its order of December 10, 2008, the district court declined to recuse on the basis that:

> The facts of the instant case do not warrant recusal. As Chief Administrator of the [MSA], the Court serves in an administrative capacity that has no substantive effect on its management of the MDL proceedings. *See In re Vioxx Prods. Liab. Litig.*, MDL No. 1657,

> 2008 WL 4091672, at *2 (E.D. La. Aug. 27, 2008) (explaining that the Court "has consistently exercised its inherent authority over the MDL proceedings in coordination with its express authority under the terms of the Settlement Agreement to ensure that the settlement proceedings move forward in a uniform and efficient manner"). The Court played no role in drafting the private settlement agreement reached by the parties; the Court has taken no position as to what types of claims should or should not have been included in the settlement; and, finally, the Court has consistently stated that it neither encourages nor discourages participation in the settlement.

"A motion to disqualify is committed to the sound discretion of the judge and her decision will only be reversed if there has been an abuse of that discretion." *In re Hipp, Inc.*, 5 F.3d 109, 116 (5th Cir. 1993). The federal recusal statute provides that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455. "The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988) (citing S. REP. NO. 93-419, at 5 (1974) and H.R. REP. NO. 93-1453, at 5 (1974)). "Thus, it is critically important in a case of this kind to identify the

facts that might reasonably cause an objective observer to question [the judge's] impartiality." *Id.* In applying § 455, the court employs an objective test, finding recusal warranted "if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality." *IQ Prods. Co. v. Pennzoil Prods. Co.*, 305 F.3d 368, 378 (5th Cir. 2002) (quotation omitted).

1. Encouraging Participation in Settlement

The Dier plaintiffs submit that the district court's statement that it "has consistently stated that it neither encourages nor discourages participation in the settlement" takes "too myopic a view" of the court's role as both chief administrator of the MSA and as presiding judge in the MDL litigation. They point to the Conference Order, which required all non-settling plaintiffs to appear at conferences "to ensure that plaintiffs who are eligible for the Vioxx settlement program but who have not enrolled in the program have all necessary information available to them so they can make informed choices," and argue that this order permits the inference that the district court encouraged settlement. The Conference Order, however, did not inappropriately encourage settlement. It "is not unusual to require the parties as well as counsel to appear at settlement conferences." *Bilello v. Abbott Labs.*, 825 F. Supp. 475, 479 (E.D.N.Y. 1993). For example, Federal Rule of Appellate Procedure 33 authorizes courts of appeals to "direct the attorneys—and, when appropriate, the parties—to participate in one or more

conferences to address any matter that may aid in disposing of the proceedings, including . . . discussing settlement. A judge or other person designated by the court may preside over the conference." FED. R. APP. P. 33. Nothing about the settlement conferences would give a reasonable observer any doubt about Judge Fallon's impartiality.

2. Appearance of Partiality

In support of their argument that the district court's impartiality could reasonably be questioned, the Dier plaintiffs assert that at least one plaintiff lacked confidence in the district court's impartiality as a result of its dual responsibilities. But because the test for impartiality is an objective one, *see IQ Prods. Co.*, 305 F.3d at 378, an individual plaintiff's subjective beliefs are irrelevant to the analysis.

For the reasons articulated by Judge Fallon, his decision not to recuse falls well within the bounds of his discretionary authority.

C. Pre-Trial Order 28 Requiring Production of a Doctor's Report

The Dier plaintiffs' final argument is that it was an abuse of discretion for the district court to issue the case-specific expert disclosure requirement in PTO 28. They contend that Merck was aware of the nature of their alleged injuries and the injuries' purported link to Vioxx. They further assert that even if issuance of

PTO 28 was generally within the district court's discretion, in instances where state law requires no expert opinion as part of the evidence to support the claim, imposing such a requirement is an abuse of discretion and contravenes the *Erie* doctrine. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–80 (1938).

1. The Court and Merck were Already Apprised of Plaintiffs' Injuries

A district court's adoption of a *Lone Pine* order and decision to dismiss a case for failing to comply with a *Lone Pine* order are reviewed for abuse of discretion. *Acuna*, 200 F.3d at 340–41.

Relying on *Acuna*, the district court stated that "it is not too much to ask a plaintiff to provide some kind of evidence to support their claim that Vioxx caused them personal injury." *In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d at 744. In *Acuna*, over 1,000 plaintiffs brought personal injury claims allegedly arising from uranium mining activities. The district court issued pre-discovery *Lone Pine* orders that required plaintiffs to provide expert affidavits specifying the injuries suffered by each plaintiff, the substances causing the injury, the dates and circumstances of exposure to the injurious materials, and the scientific and medical bases for the expert's opinions. *Acuna*, 200 F.3d at 338. The district court ultimately dismissed plaintiffs' claims for failure to comply with the *Lone Pine* orders. *Id.* at 340. On appeal, plaintiffs challenged the *Lone Pine* orders as imposing too high a burden at too early a stage in the

litigation. *Id.* This court stated that "[i]n the federal courts, such orders are issued under the wide discretion afforded district judges over the management of discovery under FED. R. CIV. P. 16." *Id.* The court then held that the *Lone Pine* orders

> essentially required that information which plaintiffs should have had before filing their claims pursuant to FED. R. CIV. P. 11(b)(3). Each plaintiff should have had at least some information regarding the nature of his injuries, the circumstances under which he could have been exposed to harmful substances, and the basis for believing that the named defendants were responsible for his injuries.

Id. (citing *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 165 (5th Cir. 1999)). Thus, the *Acuna* court concluded that the district court did not commit an abuse of discretion by dismissing plaintiffs' claims for failure to comply with the *Lone Pine* order. *Id.* at 341.

The Dier plaintiffs contend that this case is distinguishable from *Acuna* because here the plaintiffs have alleged precise injuries and both the court and Merck are on notice of the nature of the injuries and the injuries' relationship to Merck's conduct. These grounds are insufficient, however, to warrant bypassing the clear holding in *Acuna* that it is within a court's "discretion to take steps to manage the complex and potentially very burdensome discovery that the cases would require." *Id.* at 340.

2. Requirement of Proof of Physical Injury for Emotional Distress Claims

The Dier plaintiffs also argue that PTO 28 was improper because expert testimony is not required for claims of negligent infliction of emotional distress under New York law.[4] But the Dier plaintiffs all pleaded physical injuries, and none attempted to withdraw those physical injury claims. Thus, PTO 28 would apply regardless of whether the Dier plaintiffs might have had a viable negligent infliction of emotional distress claim along with their physical injury claims.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

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4. "[T]he substantive law of each plaintiff's home jurisdiction must be applied to his or her respective claims." *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 458 (E.D. La. 2006).

APPENDIX B — PETITION FOR REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED AUGUST 19, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-30446

IN RE: VIOXX PRODUCTS LIABILITY LITIGATION

GLENN L. DIER,

Plaintiff - Appellant

v.

MERCK AND COMPANY, INC.,
A Foreign Corporation,

Defendant - Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING EN BANC

(Opinion 7/16/10, 5 Cir., ____, _____, F.3d _____)

Before GARWOOD, STEWART, and CLEMENT, Circuit Judges.

Appendix B

PER CURIAM:

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

APPENDIX C — ORDER & REASONS OF THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA FILED APRIL 28, 2009

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MDL NO. 1657

SECTION: L

IN RE: VIOXX PRODUCTS LIABILITY LITIGATION

JUDGE FALLON

MAG. JUDGE KNOWLES

THIS DOCUMENT RELATES TO: CASES LISTED ON EXHIBITS A & B

ORDER & REASONS

Currently pending before the Court are the cases of certain plaintiffs subject to this Court's Order to Show Cause Why Cases Should Not be Dismissed for Failure to Comply with Pre-Trial Orders 28 and 29 (Rec. Doc. 17108), and certain plaintiffs' Cross-Motions for Miscellaneous Relief (Rec. Docs 17574, 17575). For the following reasons, the Plaintiffs' cross-motions are DENIED, and their claims are hereby DISMISSED WITH PREJUDICE.

Appendix C

I. FACTUAL BACKGROUND

On November 9, 2007, the parties announced the establishment of a Vioxx Resolution Program that encompasses all claims alleging a heart attack, sudden cardiac death, or stroke.[1] Also on that date, the Court entered two pre-trial orders requiring plaintiffs and tolling agreement claimants to produce specified information regarding their claims if they are not eligible for or have not submitted their claims to the Vioxx Resolution Program. Under Pre-Trial Order No. 28 ("PTO 28"), plaintiffs and tolling agreement claimants with claims pending as of November 9, 2007, must provide case-specific expert reports to Merck by certain dates based on the first letter of the plaintiff's last name. Plaintiffs whose last names begin with the letters A through L were initially required to submit this information by May 1, 2008, and plaintiffs whose last names begin with the letters L through Z were initially required to submit this information by July 1, 2008. Pre-Trial Order No. 29 ("PTO 29") imposes similar requirements on plaintiffs whose claims are filed or transferred to the MDL after November 9, 2007. PTO

1. For a more detailed factual background describing the events that took place prior to the inception of this Multidistrict Litigation, see *In re Vioxx Prods. Liab. Litig.*, 401 F. Supp. 2d 565 (E.D. La. 2005) (resolving *Daubert* challenges to a number of expert witnesses). For a more detailed factual background describing the terms of the Vioxx Master Settlement Agreement and the events that took place after the parties reached a settlement, see *In re Vioxx Prod. Liab. Litig.*, MDL No. 1657, 2008 WL 3285912 (E.D. La. Aug. 7, 2008) (denying third-party payors' motions to enjoin interim payments).

29 also sets deadlines, but it does so by reference to the date a claim is filed in, or transferred to, the MDL, rather than by reference to a specific calendar date. *(See* PTO 29 at 3 (requiring each plaintiff to comply with discovery requirement within 45 days of filing a claim in the MDL, or within 45 days of transfer to the MDL, if the case was filed elsewhere)).

On December 10, 2007, certain plaintiffs, all of whom are represented by attorney Ronald Benjamin, appealed PTO 28 to the United States Court of Appeals for the Fifth Circuit. The plaintiffs sought to have the Fifth Circuit vacate this Court's requirement that plaintiffs produce case-specific expert reports. On March 28, 2008, the Fifth Circuit dismissed the plaintiffs' appeal without an opinion. *See In re Vioxx Prods. Liab. Litig.*, Case No. 07-31164 (5th Cir. March 28, 2008) (per curiam).

On April 17, 2008, certain other plaintiffs filed a motion to suspend or modify the requirements of PTO 28. These plaintiffs argued that it was premature to require case-specific expert reports from those plaintiffs who alleged injuries for which the PSC had not yet developed general causation expert reports. According to these plaintiffs, PTO 28 did not allow eligible plaintiffs who chose not to enroll in the settlement sufficient time to develop expert reports or obtain new counsel. These plaintiffs essentially argued that PTO 28 "is unfair and unilaterally slanted in favor of Merck, both in general and specific causation." *See In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741, 743 (E.D. La. 2008).

Appendix C

On May 30, 2008, the Court granted in part and denied in part the plaintiff's motion to vacate PTO 28, explaining that PTO 28 "is a type of pre-trial order commonly known as a *Lone Pine* order," and that "[t]he United States Court of Appeals for the Fifth Circuit has recognized the value of and approved the use of *Lone Pine* orders in mass tort litigation." *Id.* (citing *Acuna v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000) (holding that it is within a district court's discretion to issue a *Lone Pine* scheduling order that essentially requires the production of "information that plaintiffs should have had before filing their claims")). In light of the advanced stage of the Vioxx litigation, the Court explained that, after nearly a decade of discovery, "it is not too much to ask a plaintiff to provide some kind of evidence to support their claim that Vioxx caused them personal injury, whether the injury be deep vein thrombosis, a heart attack, an ulcer, or some other malady." *Id.*[2] To ensure that all plaintiffs had a fair opportunity to comply with the requirements of PTO

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2. The Court went on to explain that PTO 28 was particularly appropriate given the advanced stage of the Vioxx litigation, both in the federal MDL and the state courts:

> [I]n the present case, a *Lone Pine* order may not have been appropriate at an earlier stage before any discovery had taken place since little was known about the structure, nature and effect of Vioxx by anyone other than perhaps the manufacturer of the drug. But this case is no longer in its embryonic stage. It has existed in state courts for over seven years and in this Court for over three years, and much discovery has taken place .... For nearly a

(Cont'd)

28, however, the Court granted the plaintiffs' request to extend the deadlines for providing case-specific expert reports, providing that plaintiffs whose last names begin with the letters A through L would be required to submit their reports by July 1, 2008, and claimants whose last names begin with the letters M through Z would be required to submit reports by August 1, 2008. *Id.*

One month later, on June 30, 2008—the day before their PTO 28 filings were due—attorney Ronald

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(Cont'd)

> decade, Plaintiffs' counsel throughout the country have been studying, exploring, and discovering all of the effects of Vioxx on the human body. In this MDL, the PSC did not selectively discover only MI's or strokes, but rather they conducted general discovery on the effects Vioxx may or may not have on individuals. All of this material is and has been available to counsel in the individual cases.
>
> The Court finds that at this advanced stage of the litigation, it is not too much to ask a Plaintiff to provide some kind of evidence to support their claim that Vioxx caused them personal injury, whether that injury be deep vein thrombosis, a heart attack, an ulcer, or some other malady. Surely if Plaintiffs' counsel believe that such claims have merit, they must have some basis for that belief; after all this time it is reasonable to require Plaintiffs to come forward and show some kind of basic evidence of specific causation.

In re Vioxx Prods. Liab. Litig., 557 F. Supp. 2d at 744.

Benjamin's clients filed a motion seeking miscellaneous relief, including extension of the deadlines to produce expert reports to October 31, 2008, this Court's recusal, and, in the alternative, an order vacating PTOs 28 and 29 or vacating the Master Settlement Agreement. On November 5, 2008, five days after the latest deadline proposed in his earlier motion, Mr. Benjamin filed a request for a pre-motion conference to stay any further motions by Merck seeking dismissal for noncompliance with PTO 28. On December 10, 2008, the Court denied the plaintiffs' motion and request in its entirety. *See* Rec. Doc. 17394.

II. PRESENT MOTIONS

On November 26, 2008, Merck filed its Third Motion for Order to Show Cause Why Certain Plaintiffs' Cases Should Not be Dismissed for Failure to Comply with the Court's *Lone Pine* Orders. *See* Rec. Doc. 16989. On December 3, 2009, the Court granted the motion and ordered the plaintiffs, all of whom are represented by attorney Ronald Benjamin, to show cause on January 9, 2009, why their cases should not be dismissed for failing to produce case-specific expert reports. *See* Rec. Doc. 17108.

The majority of the plaintiffs subject to the order did not produce expert reports, but instead filed responses in opposition to the show cause order, asserting a variety of reasons in support of their argument that the deadlines imposed by PTO's 28 and 29 either do not apply to them or should be modified or

extended. In addition, the plaintiffs also filed cross-motions for various relief, including, *inter alia*, extensions of time to comply, and this Court's recusal from any further consideration of their motions.

III. LAW & ANALYSIS

This Court has previously held that PTOs 28 and 29 are enforceable, that the deadlines for compliance will not be extended further, and that recusal is not warranted given the facts of this case. *See In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741, 743 (E.D. La. 2008); Order & Reasons, Rec. Docs. 17394. For purposes of this opinion, the Court adopts its earlier reasoning and finds that the plaintiffs' redundant requests for recusal, additional extensions of time, or modification of PTOs 28 and 29 are without merit.

Further, the Court has afforded the plaintiffs more than enough time to comply with PTOs 28 and 29. Indeed, the plaintiffs have had since November 2007 to produce case-specific expert reports but have failed to do so. Even after counsel's earlier appeal was denied by the Fifth Circuit without an opinion, the Court extended the deadlines for compliance to afford all plaintiffs additional time to produce case-specific expert reports. Since then, the Court has repeatedly enforced PTOs 28 and 29 as to plaintiffs who have failed to comply with the deadlines. These plaintiffs do not warrant any additional consideration beyond that which the Court has afforded to other plaintiffs also subject to PTOs 28 and 29. Indeed, it is now a year and a half since many of the plaintiffs in these cases were first directed to produce expert reports, but, rather than simply comply

with the Court's orders, their attorney continues to argue that the deadlines are either too harsh or are inapplicable. As a result, the plaintiffs' request for further extensions is, to say the least, not persuasive. In addition, the Court finds that the plaintiffs' attorney's argument that dismissal is inappropriate as to any plaintiffs who have only partially complied with the order is similarly without merit. The plaintiffs have had more than enough time to cure any deficiencies in their submissions. At this stage of the proceedings, dismissal with prejudice is the only appropriate remedy for the plaintiffs' repeated failure to produce reports in accordance with PTOs 28 and 29.

Mr. Benjamin's attempts to circumvent valid discovery orders on behalf of his clients are not unique to this litigation. *See, e.g., In re Diet Drugs Prods. Liab. Litig.*, 30 F. App'x 27, 28-29 (3d Cir. 2002). In the *In re Diet Drugs* litigation, the Third Circuit affirmed the district court's dismissal of certain of Mr. Benjamin's cases for failure to comply with similar discovery orders. As the Third Circuit explained, "counsel had numerous opportunities to comply with the District Court's long-standing discovery order, yet stubbornly clung to his argument that he should not have to [do so]. Neither multiple express rejections of this already-rejected argument, nor threats of dismissal ameliorated counsel's defiance of the discovery schedule." *Id.* Describing Mr. Benjamin's numerous discovery abuses as "a parade of obstinance," the Third Circuit explained that his refusal to comply with the district court's discovery orders had

"ultimately cost his clients their day in court." *Id.*[3] Given this history, it is unfortunate, though perhaps not surprising, that Mr. Benjamin has attempted to pursue the same failed tactics in this litigation.

IV. CONCLUSION

IT IS ORDERED that the plaintiffs' cross-motions (Rec. Docs. 17574, 17575) are DENIED.

IT IS FURTHER ORDERED that the plaintiffs listed in Exhibits A and B are hereby DISMISSED WITH PREJUDICE.[4]

New Orleans, Louisiana, this 28th day of April, 2009.

/s/ Eldon E. Fallon
UNITED STATES DISTRICT JUDGE

3. Recently, the Superior Court of New Jersey, one of the coordinate Vioxx jurisdictions, denied Mr. Benjamin admission to practice *pro hac vice*, because the court found that, among other things, Mr. Benjamin had failed to disclose a lengthy history of ethical violations and sanctions in his application to practice *pro hac vice*.

4. During the course of briefing, the parties advised the Court that a number of the plaintiffs initially subject to the show cause order are now in compliance. These plaintiffs, all of whom have been excepted from the scope of this order, include Scott Berthel, Matthew Cavallo, Richard F. Core, Marjorie Curtis, James Demoski, Edward Henderson, Kristina Hia, Maurice Hoyt, Mary Kurtz, Wilson Lord, Ann M. Mannino, Arthur Pratt, Viola Santacrose, Frank Spencer, and Timothy Mack. The remaining plaintiffs listed on Exhibits A and B have either provided no discovery at all or have provided some discovery but have failed to produce case-specific expert reports as set forth in PTOs 28 and 29.

EXHIBIT A: PLAINTIFFS SUBJECT TO PTO 28

CASE	DOCKET NUMBER	PLAINTIFF LAST NAME	FIRST NAME	MIDDLE
Agard v. Merck & Co., Inc.	2:05-cv-01089	Darrow	Rodney	
Agard v. Merck & Co., Inc.	2:05-cv-01089	O'Connor	Ronald	R
Aljibory v. Merck & Co., Inc.	2:05-cv-01090	Aljibory	Adnan	A
Aljibory v. Merck & Co., Inc.	2:05-cv-01090	Robinson	Rosanna	
Cavallo v. Merck & Co., Inc.	2:05-cv-01513	DeRosa	Alphonse	V
Cavallo v. Merck & Co., Inc.	2:05-cv-01513	Smith	Victoria	
Connolly v. Merck & Co., Inc.	2:06-cv-02708	Connolly	Marjorie	
Connolly v. Merck & Co., Inc.	2:06-cv-02708	Donahue	Kristina	
Connolly v. Merck & Co., Inc.	2:06-cv-02708	Harris, Jr.	Charles	
Connolly v. Merck & Co., Inc.	2:06-cv-02708	Hickok	Sheila	L
Connolly v. Merck & Co., Inc.	2:06-cv-02708	Hochrun	Joanne	
Connolly v. Merck & Co., Inc.	2:06-cv-02708	Holdredge	Suzanne	
Connolly v. Merck & Co., Inc.	2:06-cv-02708	Kunik	Frank	P
Connolly v. Merck & Co., Inc.	2:06-cv-02708	Patrick	William	
DeVincentiis v. Merck & Co., Inc.	2:06-cv-02297	DeVincentiis	Carlo	
DeVincentiis v. Merck & Co., Inc.	2:06-cv-02297	Lindsey	Kimberly	
Dier v. Merck & Co., Inc.	2:05-cv-01088	Dier	Glenn	L
Gates v. Merck & Co., Inc.	2:05-cv-05221	Gates	Robert	
Gates v. Merck & Co., Inc.	2:05-cv-05221	Gehm	Herbert	
Hoffner v. Merck & Co., Inc.	2:05-cv-02238	Carniero	Manuel	
Hoffner v. Merck & Co., Inc.	2:05-cv-02238	Hoffner	Kathleen	
Hoffner v. Merck & Co., Inc.	2:05-cv-02238	Roman	Thomas	J
Holobosky v. Merck & Co., Inc.	2:05-cv-01091	Holobosky	Rosemary	T
Holobosky v. Merck & Co., Inc.	2:05-cv-01091	Smith	Sheila	
Holobosky v. Merck & Co., Inc.	2:05-cv-01091	Sullivan	Thomas	J

EXHIBIT B: PLAINTIFFS SUBJECT TO PTO 29

CASE	DOCKET NUMBER	PLAINTIFF LAST NAME	FIRST NAME	MIDDLE
Adelberg v. Merck & Co., Inc.	2:08-cv-04173	Adelberg	Carol	
Adelberg v. Merck & Co., Inc.	2:08-cv-04173	Amendoeira	Antonio	
Alapeck v. Merck & Co., Inc.	2:08-cv-03221	Alapeck	Geraldine	M
Bilik v. Merck & Co., Inc.	2:08-cv-04172	Alapeck	Geraldine	M
Bilik v. Merck & Co., Inc.	2:08-cv-04172	Bilik	Helen	
Bilik v. Merck & Co., Inc.	2:08-cv-04172	Boone	Elizabeth	
Bilik v. Merck & Co., Inc.	2:08-cv-04172	Croft	Carolyn	S
Bilik v. Merck & Co., Inc.	2:08-cv-04172	Mahar	Mary	J
Bilik v. Merck & Co., Inc.	2:08-cv-04172	Sanatcrose	Dean	
Bilik v. Merck & Co., Inc.	2:08-cv-04172	Simmons	Stasia	
Cadwell v. Merck & Co., Inc.	2:08-cv-04167	Cadwell	Albert	D
Cadwell v. Merck & Co., Inc.	2:08-cv-04167	Cadwell	Samuella	
Cadwell v. Merck & Co., Inc.	2:08-cv-04167	Corprew	Wilbert	
Cadwell v. Merck & Co., Inc.	2:08-cv-04167	Plocek	Elsa	
Cadwell v. Merck & Co., Inc.	2:08-cv-04167	Schaffer	Ronald	H
Croft v. Merck & Co., Inc.	2:08-cv-04171	Croft	Caroline	S
Mahar v. Merck & Co., Inc.	2:08-cv-03222	Mahar	Mary	J
Pitcher v. Merck & Co., Inc.	2:08-cv-04170	Pitcher	Kevin	
Raftis v. Merck & Co., Inc.	2:08-cv-04166	Raftis	Marianne	
Santacrose v. Merck & Co., Inc.	2:08-cv-04168	Santacrose	Dean	
Steinhoff v. Merck & Co., Inc.	2:08-cv-04169	Steinhoff	Margaret	

(79 (2)

No. 10-666

JUN 21 2011

IN THE

Supreme Court of the United States

GLENN L. DIER ET AL.,
Petitioners,

v.

MERCK SHARP & DOHME CORP.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTIONS PRESENTED

After years of personal-injury litigation concerning the prescription drug Vioxx, attorneys representing plaintiffs and the defendant, Merck Sharp & Dohme Corp., agreed to establish a private claims-resolution program for plaintiffs alleging that Vioxx caused them to sustain a heart attack, an ischemic stroke or sudden cardiac death. Participation in the program was voluntary, and the program resulted in the resolution of tens of thousands of claims. In order to streamline resolution of unsettled claims, the district court entered pretrial orders requiring non-settling plaintiffs to submit a case-specific expert report linking their alleged injury to Vioxx. The orders stated that plaintiffs who failed to comply with their terms would face dismissal of their claims. Petitioners refused to comply with the orders. After extending the time to comply with the orders by more than a year, and entertaining multiple motions by the petitioners to set aside the settlement and to modify or vacate the orders, the district court dismissed their claims. The court of appeals affirmed.

The questions presented are the following:

1. Did the court of appeals correctly find that petitioners, who did not settle their claims and were free to pursue them in court, lacked standing to challenge a private, opt-in settlement agreement?

2. Did the court of appeals properly hold that the district court acted within its broad authority to manage multidistrict litigation in entering a pair of orders requiring non-settling Vioxx plaintiffs to submit an expert report linking their alleged injuries to Vioxx?

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Charles Alan Wright *et al.*, *Federal Practice & Procedure* (3d ed. 2010) 25

JURISDICTION

Jurisdiction is lacking with respect to the first question presented. Although petitioners cite 28 U.S.C. § 1254(1), they fail to present a "Case" or "Controversy" as required for the invocation of federal jurisdiction under Article III of the U.S. Constitution because they lack standing to challenge the private, opt-in settlement agreement to which they were not parties.

STATEMENT OF THE CASE

Petitioners ask the Court to set aside a private, opt-in settlement agreement to which they are not parties. According to petitioners, the private agreement, in combination with a set of modest discovery orders entered by the district court below, operated as a de facto class-action settlement. But no one other than petitioners has ever accepted that theory, and there is no division of authority on the question. Thus, even accepting petitioners' contention that the issue presented is one of "exceptional public importance," there is no serious public disagreement about its resolution, leaving no need for this Court's intervention.

Moreover, even if petitioners' theory had merit, the court of appeals' ruling, affirming dismissal of petitioners' claims, would still have been proper. *Every* court to consider the question has held that non-settling parties – even parties who opt out of class settlements – lack standing to challenge a private agreement between other parties. The court of appeals properly applied this unanimous precedent to dispose of petitioners' challenge.

The court of appeals also properly rejected petitioners' argument that the district court abused its discretion in dismissing their claims for failure to comply with simple discovery orders requiring petitioners and other non-settling parties to produce expert reports linking their ingestion of Vioxx to their alleged injuries. Courts and commentators alike have acknowledged that such discovery orders are crucial tools for managing multidistrict mass tort litigation, particularly in its mature stages, and are well within a district court's broad discretion to enter.[1]

The Underlying MDL Proceeding. This case grew out of the settlement of certain claims in the litigation over the prescription drug Vioxx, a non-steroidal anti-inflammatory drug approved by the Food and Drug Administration in 1999 for the treatment of osteoarthritis pain. Litigation over Vioxx has spanned almost a decade. Beginning as early as 2001, plaintiffs in various jurisdictions filed cases asserting that Vioxx poses an increased risk of cardiovascular injuries. Vioxx was withdrawn from the market in September 2004, and MDL proceedings were established in the U.S. District Court for the Eastern District of Louisiana in 2005, ultimately comprising thousands of individually filed claims. Judge Eldon Fallon has overseen these proceedings since their inception. *See generally Plunkett v. Merck & Co.*, 401 F. Supp. 2d 565, 570-72 (E.D. La. 2005);

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[1] Petitioners' attack on the discovery orders is, in any event, a red herring: their calculated defiance of the discovery orders was merely an instrument to secure an appellate forum for their attack on a settlement that has nothing to do with them.

In re Vioxx Prods. Liab. Litig., 360 F. Supp. 2d 1352 (J.P.M.L. 2005).

To manage the sprawling proceeding, the district court appointed attorneys to serve on the Plaintiffs' Steering Committee ("PSC") and Defendant's Steering Committee. *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 608 n.3 (E.D. La. 2008). The court held monthly status conferences with the committees to review the progress of the litigation. *Id.* at 608. However, the court did not require individual plaintiffs to rely on the PSC to represent their interests at these conferences; the conferences were open to anyone who wished to attend. *In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741, 744 (E.D. La. 2008).

The district court quickly directed the parties to address whether it could certify a class of personal injury plaintiffs. In November 2006, after the parties briefed the issue, the court entered an order denying certification of a nationwide class. *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 459 (E.D. La. 2006). The court found that the choice-of-law analysis would "present[] significant hurdles to certification of a nationwide class . . . because the application of the laws of fifty-one jurisdictions . . . creates problems for typicality, adequacy, predominance, and superiority . . . ." *Id.* The court also noted that the personal injury claims raised numerous individualized questions of fact that would prevent the putative class from satisfying Rule 23(a) and (b)(3). *Id.* at 460-63.

After the district court denied class certification, the parties continued with bellwether trials – "test cases" intended to assist the parties in moving toward resolution of the litigation. *In re Vioxx*, 574 F. Supp. 2d at 608-09. The majority of these trials re-

sulted in defense verdicts. *Id.* During the same time period, there were thirteen trials in state courts around the country, and the majority of those trials resulted in defense verdicts too. *Id.* at 609. (*See also* Pet. 29 n.12.)

Master Settlement Agreement. On November 9, 2007, following several years of litigation, discovery of millions of documents and depositions of numerous witnesses and experts, counsel for Merck and the Negotiating Plaintiffs' Counsel ("NPC") announced a private agreement to settle many Vioxx personal injury cases pending in the MDL proceeding and other jurisdictions around the country. (*See* Master Settlement Agreement, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Nov. 9, 2007) ("MSA"), *available at* http://www.browngreer.com/vioxxsettlement.)

The MSA established a $4.85 billion fund to resolve cases pending on November 9, 2007, in which the plaintiffs claimed that Vioxx caused a heart attack, ischemic stroke or sudden cardiac death. MSA, Recitals. The parties requested that Judge Fallon carry out certain administrative responsibilities under the Agreement in connection with the settlement. (*Id.* § 6.1.1.)

Claimants could enroll in the MSA if they met certain criteria that the MSA identified as "gates." (*See* MSA § 2.2.1.) Claimants passed the "injury" gate if they asserted one of three injuries – heart attack, ischemic stroke or sudden cardiac death – as defined by the MSA. (*See id.* Ex. 2.2.1.1.) Claimants passed the "proximity" gate if they produced evidence that they had ingested Vioxx within 14 days of their alleged injury. (*See id.* Ex. 2.2.1.3.)

Unlike a class settlement, the MSA bound only those claimants who affirmatively consented to its terms and opted into the resolution program it created. Plaintiffs' counsel were to decide whether they could ethically recommend settlement to all of their clients. (*Id.* § 1.2.8.1.)[2] Many did so, but the decision whether to enroll was left exclusively with the individual plaintiffs.

Petitioners were not eligible to participate in the MSA because the injuries they allege were not covered by the agreement (and because some of them filed their cases after November 9, 2007, the last filing date on which claims were eligible for resolution).[3]

The MSA's resolution program is essentially complete. At this time, all claims submitted for

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[2] Counsel were also free to recommend the settlement to some or none of their clients, but they could not automatically enroll their clients in the resolution program under those circumstances. The MSA permitted Merck to waive objection to partial enrollment in these situations or to raise an objection to be resolved by Judge Fallon. (MSA §§ 1.2.8, 1.2.9.) Plaintiffs' counsel who recommended settlement to all clients were permitted to enroll only those clients who wished to participate in the program, provided that counsel attempted to withdraw from representation of clients who did not wish to participate. (*Id.* § 1.2.8.2.) These provisions of the MSA were carefully applied to ensure that each litigant had representation and that each attorney could comply with his or her ethical obligations.

[3] Petitioners do not identify their alleged injuries in their petition, but the alleged injuries include heart palpitations, loss of consciousness and chest pain.

resolution have been resolved and nearly all payments have been made.

The District Court's Discovery Orders. Despite the success of the MSA, it did not resolve (and was not intended to resolve) all outstanding Vioxx personal injury claims. Recognizing as much, on the day the MSA was announced, the district court entered several new pretrial orders ("PTOs") to prepare the remaining cases for the next phase of litigation.

Two of these orders – PTOs 28 and 29 – impose limited document-preservation and discovery obligations on plaintiffs with pending claims. The orders imposed substantially identical requirements, but PTO 28 covered claims that were pending on the date of the settlement, while PTO 29 covered claims that were filed thereafter. In relevant part, PTOs 28 and 29 both required plaintiffs to submit a Rule 26(a)(2) case-specific expert report from a medical expert attesting that the plaintiff sustained an injury and that Vioxx caused the injury. (PTO 28 § II, A-9-A-10; PTO 29 § II, A-26.) Such orders are common in mass-tort litigation and are sometimes called "*Lone Pine*" orders, named for the first case to employ such case-management techniques.[4]

The document productions required by PTOs 28 and 29 were to be made within specific time periods. For cases pending on the date of the settlement,

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[4] *See Lore v. Lone Pine Corp.*, No. L-33606-85, 1986 WL 637507 (N.J. Super. Ct. Law Div. Nov. 18, 1986); *see also* David F. Herr, *Ann. Manual for Complex Litigation* § 11.3 (4th ed. 2010) (explaining that *Lone Pine* orders "have been widely used in mass torts to isolate spurious claims") (collecting illustrative cases).

plaintiffs whose last names began with A through L ("A-L plaintiffs") were to produce all required documents by May 1, 2008; plaintiffs whose last names began with M through Z ("M-Z plaintiffs") were to produce the documents by July 1, 2008. (PTO 28 § II.C, A-10-A-11.) Plaintiffs filing after the settlement date were given 45 days to produce required documents. (PTO 29 § II.A, A-23.) In the event plaintiffs failed to comply with the requirements of either PTO 28 or 29, they were entitled to 30 extra days to cure any deficiency, after which time Merck was permitted to move for an order to show cause why the noncomplying cases should not be dismissed with prejudice. (PTO 28 §§ I.D, II.D, A-5, A-12; PTO 29 §§ I.E, II.C, A-22, A-27.)

To make clear that PTO 28 applied only to nonsettling cases that were pending prior to November 9, 2007, the order expressly provided that it did not apply if "(a) the injury alleged is a Myocardial Infarction ('MI'), Sudden Cardiac Death ('SCD'), or Stroke as those terms are defined, infra., in Section III, *and* (b) the Plaintiff or Claimant has submitted the claim to the Resolution Program." (PTO 28 § II.A, A-6.) Section III of PTO 28 defined those injuries – necessarily tracking the definitions employed in the MSA itself – to ensure that PTO 28 reached nonsettling plaintiffs only, as no further discovery or preservation was required for plaintiffs who had decided to resolve their claims by settlement. (PTO 28 § III, A-13-A-18.) No similar definition section was included in PTO 29 – and none was needed – because no claim filed after November 9, 2007, was eligible for resolution under the MSA. (MSA, Recitals, ¶ H.)

The district court also entered two other orders to facilitate management of the litigation while the MSA registration and resolution process was pending. The first, PTO 30, imposed a stay of discovery to allow plaintiffs to consider whether to enroll in the MSA's resolution program, with an exception for the discovery requirements set forth in PTOs 28 and 29. (Pet. App. A, at 4a; PTO 30, A-35-A-37.) The second, PTO 31, required plaintiffs' counsel to register all claims in which they had an interest with the district court and indicate whether they planned to recommend enrollment in the resolution program.[5]

Challenges to the MSA and PTOs 28-31. Because petitioners alleged injuries that were not covered under the MSA's terms, they could not settle their claims. Rather, they set out to challenge the MSA and the requirements set forth in the district court's new PTOs. In December 2007, less than a month after the MSA was announced, a group of plaintiffs represented by petitioners' counsel ("*Agard* plaintiffs")[6] appealed to the Fifth Circuit – ostensibly from the MSA and PTO 28. Because neither the MSA nor PTO 28 was a final judgment, and because no other basis existed for appeal, Merck moved to dis-

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[5] Petitioners mischaracterize PTO 31 as "requiring all plaintiffs' counsel of record . . . to recommend to each client that they enroll in the MSA." (Pet. 14.) PTO 31 required no such thing. It merely required counsel to indicate whether they intended to make such a recommendation, or whether they instead recommended against settlement. (PTO 31 Ex. A, A-43-A-45.)

[6] Among the *Agard* plaintiffs was Robert D. Gates, who is a petitioner in the instant matter.

miss the appeal. The Fifth Circuit granted Merck's motion without an opinion. (*See* Pet. App. C, at 19a.)

Shortly after the Fifth Circuit dismissed the *Agard* plaintiffs' appeal, another group of plaintiffs represented by the Oldfather Law Firm ("Oldfather plaintiffs") moved the district court to modify or suspend PTO 28. The district court rejected their arguments that the PTO was premature and unfairly burdensome. *See In re Vioxx*, 557 F. Supp. 2d at 743 (explaining that *Lone Pine* orders like PTO 28 are a recognized and appropriate means "to identify and cull potentially merit less claims and streamline litigation") (internal quotation marks and citation omitted). According to the court, "it is not too much to ask a Plaintiff to provide some kind of evidence to support their claim that Vioxx caused them personal injury." *Id.* at 744. After all, "if Plaintiffs' counsel believe that such claims have merit, they must have some basis for that belief." *Id.* Nonetheless, the court extended the PTO 28 deadlines "to ensure that all Plaintiffs ha[d] a fair opportunity to comply with [the limited discovery] provision of PTO 28." *Id.* at 745. The court extended the deadline for A-L plaintiffs to July 1, 2008 and the deadline for M-Z plaintiffs to August 1, 2008. *Id.*[7]

On the day before the first of these extended deadlines, the *Agard* plaintiffs filed a motion making substantially the same arguments as those made by

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[7] Thus, while petitioners contend that the Oldfather challenge was "rejected by the district court" (Pet. 16), the reality is that the primary relief those plaintiffs sought – an extension of time limits to comply with PTO 28 – was in fact granted.

the Oldfather plaintiffs. In addition, the *Agard* plaintiffs argued that the district court's role as settlement administrator and coordinator of the MDL proceeding created an incurable conflict of interest, requiring Judge Fallon to resign as settlement administrator. Further, they sought to eliminate the case-specific-expert-report requirement and argued that the MSA should be vacated or declared void under Rule 23. Finally, they sought an extension of the PTO 28 deadline to September 30, 2008 for A-L plaintiffs and October 31, 2008 for M-Z plaintiffs. (*See* Pet. App. C, at 21a-22a.)

On December 10, 2008, the district court denied the *Agard* plaintiffs' motion in its entirety. The court upheld the requirements of PTO 28, relying on its reasoning in the Oldfather ruling that PTO 28 is a standard *Lone Pine* order designed to streamline mass litigation. (A-55-A-58.) The court described the *Agard* plaintiffs' complaint regarding the ostensible burdensomeness of PTO 28 as "simply not credible." (A-57.) In addition, the court ruled that Judge Fallon need not resign as administrator of the settlement. According to the district court, "[t]he facts of the instant case do not warrant recusal" because "the [c]ourt serves in an administrative capacity" in connection with the settlement "that has no substantive effect on its management of the MDL proceedings." (A-53.) In his ruling, Judge Fallon emphasized that "[t]he Court played no role in drafting the private settlement agreement reached by the parties; the Court has taken no position as to what types of claims should or should not have been included in the settlement; and, finally, the Court has consistently stated that it neither encourages nor discourages participation in the settlement." (A-54.) The court

also declined the *Agard* plaintiffs' invitation to void the MSA, explaining that "[u]nlike a class settlement, the MSA is a private, opt-in settlement that was not secured through a settlement class vehicle and [it] therefore poses no risk of binding any unwilling plaintiff to its terms." (A-55.)

Dismissal of Petitioners' Claims. On November 26, 2008, Merck filed a motion for an order to show cause why petitioners' claims should not be dismissed in light of their failure to comply with PTOs 28 and 29.[8] The district court granted the motion and ordered petitioners to respond by January 9, 2009. (Pet. App. C, at 22a.) Petitioners filed two responses purporting to show why their cases should not be dismissed and two cross motions, again requesting an extension of discovery deadlines and recusal of Judge Fallon. (*See id.* at 22a-23a.) The filings substantially repeated the arguments made by the Oldfather and *Agard* plaintiffs in their respective challenges to PTO 28.

The district court rejected petitioners' arguments, denied their cross motions, and dismissed their cases. In so doing, the district court "adopt[ed] its earlier reasoning and [found] that the plaintiffs' redundant requests for recusal, additional extensions of time, or modification of PTOs 28 and 29 are without merit." (Pet. App. C, at 23a.) In its ruling, the court noted that the deadlines for petitioners' compliance with the PTOs had long passed; yet, "rather than simply

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[8] Merck moved under both PTOs 28 and 29 because some of the petitioners had filed their claims after November 9, 2007 – the date of the MSA – and were thus covered by PTO 29.

comply with the Court's orders, their attorney continues to argue that the deadlines are either too harsh or are inapplicable." (*Id.* at 23a-24a.) The district court also found that, "[a]t this stage of the proceedings, dismissal with prejudice is the only appropriate remedy for the plaintiffs' repeated failure to produce reports in accordance with PTOs 28 and 29." (*Id.* at 24a.) It further noted that petitioners' counsel had been reprimanded by other courts for engaging in similarly obstinate behavior.[9] (*Id.* at 25a & n.3.)

Appellate Proceedings. After the district court dismissed their cases, petitioners sought review in the court of appeals. The Fifth Circuit affirmed the district court's ruling in a *per curiam* opinion. First, the court of appeals held that petitioners lacked standing to challenge the MSA. Even "in the context of class settlements," it explained, "non-settling parties generally have no standing to challenge the settlement." (Pet. App. A, at 7a.) The only "exception to the general rule" applies where an "agreement strips non-settling parties of rights to contribution or indemnity" or "in some other manner" that "results in plain legal prejudice." (*Id.* (internal quotation marks and citation omitted).) "But mere allegations of . . . tactical disadvantage as a result of a settle-

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[9] Petitioners have been represented by two attorneys from the Law Office of Ronald R. Benjamin through the course of these proceedings – Ronald Benjamin and Marya Young. The district court's comments were in reference to Mr. Benjamin. Only Ms. Young represents petitioners before this Court, presumably because Mr. Benjamin has been disbarred from practicing before it. *See In re Disbarment of Benjamin*, 488 U.S. 1000 (1989).

ment simply do not rise to the level of plain legal prejudice." (*Id.* at 8a (alternations, internal quotation marks and citation omitted).) And because the MSA was structured as an "'opt-in' private settlement" to which petitioners were not parties, they could not show they suffered the legal prejudice necessary to establish standing. (*Id.*)

Second, the court of appeals held that the district court had not abused its discretion by entering a *Lone Pine* pretrial order or by dismissing petitioners' cases for failure to comply with that order. The court of appeals explained that the district court had followed established Fifth Circuit precedent, which acknowledged that *Lone Pine* "'orders are issued under the wide discretion afforded district judges over the management of discovery under Fed. R. Civ. P. 16.'" (*Id.* at 13a (quoting *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 340 (5th Cir. 2000)).)[10]

Petitioners now seek this Court's discretionary review.

REASONS FOR DENYING THE PETITION

1. The Court should deny the petition because this case presents no departure from the Court's precedents and no question over which lower courts are divided.

2. The Court should also deny the petition because the decisions below were correct. First, petitioners lacked standing to challenge the MSA, a

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[10] The court of appeals also affirmed the district court's order denying petitioners' recusal argument, which is not pressed before this Court. (*See* Pet. App. A, at 8a-11a.)

private, opt-in agreement to which they were not parties. Second, the district court acted well within its broad discretion to manage multidistrict proceedings when it entered, and later enforced, two pretrial orders with which petitioners refused to comply.

I. The Decision Below Does Not Present A Question Of "Exceptional National Importance" And Does Not Conflict With The Precedents Of This Or Any Other Court.

The petition should first be denied because petitioners have failed to present any remotely compelling reason for the Court to exercise its discretionary review.

First, petitioners do not point to any conflict between the decision of the court below and those of any other lower court. *See* S. Ct. R. 10(a). To the contrary, petitioners themselves concede that the Fifth Circuit "is the first federal appellate court to review . . . an agreement" such as the MSA.[11] (Pet. 20.) This alone warrants denial of the petition. *See McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari) (opining that petition for writ of certiorari should be denied where the issue requires further study in the lower courts before it is addressed by this Court).

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[11] Petitioners state that the decision below is the first "to review such an agreement *with approval*" (Pet. 20 (emphasis added)) – as if to suggest that some other courts have reviewed and *disapproved* of private, opt-in settlement agreements like the one at issue in this case. But petitioners do not cite any such cases, and Merck is not aware of any.

Second, petitioners advance no argument that the decisions below "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." S. Ct. Rule 10(a). In fact, petitioners again suggest the contrary, noting that federal courts have pursued similar courses to resolving mass-tort litigation for "the past decade." (Pet. 20.)

Third, the decisions below do not "conflict[] with relevant decisions of this Court." S. Ct. Rule 10(c). Petitioners argue that they do, contending that the decisions below are "[c]ontrary to the letter and spirit" of cases like *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard, Corp.*, 527 U.S. 815 (1999). They are wrong.

Amchem and *Ortiz* involved class settlements. The Court held those settlements to be infirm because they purported to bind the interests of certain absent class members who had no way to opt out of the agreements. Settlements in those circumstances raise due process concerns because they are binding by default. *See, e.g., In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) (explaining that the "overarching concern" relative to class settlements is "that absentees' interests are being resolved and quite possibly bound by the operation of res judicata even though most of the plaintiffs are not the real parties to the suit").

There is no such danger with the MSA. The MSA has never been viewed as a "class settlement"; after all, the district court expressly considered and denied certification earlier in the litigation. *See In re Vioxx*, 239 F.R.D. at 459; *see also Amchem*, 521 U.S. at 619-20 (explaining that class settlements are subject to

the same requirements as non-settlement class actions, with the possible exception of the manageability requirement of Rule 23(b)(3)).[12]

It is just as clear that the MSA was not a "de facto" class-action settlement, as petitioners suggest. (*E.g.*, Pet. 23.) After all, this Court's concerns in *Amchem* and *Ortiz* were animated by the fact that class settlements bind all class members except for those who affirmatively opt out – raising the risk of unwitting involvement. But that risk is not presented here because the MSA was only binding as to individuals who affirmatively opted *in* to the agreement, eliminating any risk of unintentional participation.[13] *See* John Bronsteen, *Class Action Settlements: An Opt-In*

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[12] Nonetheless, Petitioners repeatedly and erroneously refer to themselves as "absent class members," *see, e.g.*, Pet. 22 ("The Fifth Circuit erred in the first instance by classifying petitioners as non-settling parties when in fact they were absent class members."), and characterize the MSA as a class settlement, *see id.* at 19 ("On its face, the Vioxx MSA established a nationwide administrative claims regime similar to the schemes that were before this Court in *Amchem*, and later in *Ortiz*. . . .").

[13] Petitioners suggest otherwise, noting that one-third of the claimants who entered the program "received nothing" and asserting that these claimants were thereby "excluded from any compensation." (*Id.* 28-29.) Not so. While it is true that some claimants entered the resolution program and were deemed ineligible for *settlement*, each of those individuals had the option of returning his or her claim to the court system for litigation upon learning of ineligibility for settlement, meaning that ultimate *compensation* remained a possibility were those claimants to prevail at trial or reach some other form of resolution with Merck. (*See* MSA §§ 2.7.3-2.7.3.1.)

Proposal, 2005 U. Ill. L. Rev. 903, 923-25 (differentiating consensual settlements, which are not typically subject to challenge on fairness grounds, and class settlements, which are not treated as contracts and "must be approved by a court"); Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. Chi. Legal F. 519, 555 ("[A]n opt-in process protects client autonomy more fully than the opt-out process of Rule 23 . . . ."), *id.* at 571 ("The client's right to reject a settlement maintains an important incentive on lawyers to negotiate adequate settlements."). Because plaintiffs who were ineligible for settlement or who decided not to opt in remained free to litigate their individual claims against Merck, no one was at risk of being bound against his or her knowledge or consent. Accordingly, the proceedings below were in keeping with both the "letter and spirit" of this Court's prior holdings.

Petitioners suggest that the opt-in character of the settlement was illusory, citing scattered evidence of a supposed conspiracy theory: the failure of the NPC to represent all Vioxx plaintiffs, as evidenced by the MSA's exclusion of plaintiffs with injuries other than heart attacks, strokes or sudden cardiac death (Pet. 21-22); the purported "lack of adversarial presentation" to the district court before it adopted PTOs 28-31 (*id.* 28, 30); and petitioners' own "inference [that] the power of the purse had an influence in letting a wealthy defendant get out cheap" (*id.* 25). Not one of these "facts" – either by itself or in collection with the others – operated to negate the voluntary nature of the MSA. Eligible litigants retained the choice whether to settle, and not everyone did. Those who chose not to settle or who were ineligible for set-

tlement could pursue their claims in court by simply producing a single expert report that they would have inevitably been required to produce in order to take their cases to trial – and many did, belying petitioners' unsubstantiated claim that the MSA accomplished the "extinguishment" of all Vioxx-related claims. (Pet. 21.) Although *petitioners'* claims were extinguished, they affirmatively sought out that result by refusing to comply with the district court's case-management orders.

For all of these reasons, petitioners have failed to demonstrate any question meriting this Court's review, and the petition should therefore be denied.

II. The Court Of Appeals Correctly Applied Established Rules Of Law.

This Court's review is also unnecessary because the decision of the court of appeals was correct.

First, the court of appeals properly applied the settled rule that an individual who is not a party to a private settlement has no standing to challenge it. Second, the court of appeals correctly held that the district court acted within its broad discretion to manage multidistrict proceedings in entering *Lone Pine* discovery orders requiring parties to produce evidence that their claims have merit.

A. Petitioners Do Not Have Standing To Challenge A Settlement To Which They Were Not Parties.

The court of appeals correctly found that petitioners lacked standing to challenge the MSA.

"Generally, a non-settling defendant lacks standing to object to approval of a settlement because the

non-settling defendant is not affected by that settlement." *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 103 (S.D.N.Y. 1997) (citing *Zupnick v. Fogel*, 989 F.2d 93, 98 (2d Cir. 1993) (collecting authority)). This rule has a simple rationale: because non-settling parties cannot be bound by the agreement, their legal rights remain unaffected by it. *See, e.g., New Mexico ex rel. Energy & Minerals Dep't*, 820 F.2d 441, 445 (D.C. Cir. 1987) ("Only the parties who signed the settlement agreement are bound by the contract formed in it."); *see also Waller v. Fin. Corp. of Am.*, 828 F.2d 579, 582-83 (9th Cir. 1987); *Quad/Graphics, Inc. v. Fass*, 724 F.2d 1230, 1232-33 (7th Cir. 1983); *In re Viatron Computer Sys. Corp. Litig.*, 614 F.2d 11, 14 (1st Cir. 1980), *cert. denied*, 449 U.S. 826 (1980).[14]

The same rule applies in the context of class settlements. *See, e.g., Transam. Refining Corp. v. Dravo Corp.*, 952 F.2d 898, 900 (5th Cir. 1992). Thus, class members who opt out of a class settlement lack standing to challenge the settlement. "[O]pting out of a settlement and choosing to object logically are mutually exclusive options: if one actually opts out, she has no standing to object to the settlement as she will not be bound by it." *Olden v. LaFarge Corp.*, 472

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[14] In addition, "[t]his rule advances the policy of encouraging the voluntary settlement of lawsuits." *In re Integra Realty Res., Inc.*, 262 F.3d 1089, 1102 (10th Cir. 2001) (quoting *Waller*, 828 F.2d at 583). Voluntary settlements play an essential role in the resolution of mass product liability claims, which are "'ordinarily not appropriate'" for class treatment under Rule 23. *Amchem*, 521 U.S. at 625 (quoting Fed. R. Civ. 23, Advisory Committee Notes, 1966 Amendment).

F. Supp. 2d 922, 930-31 (E.D .Mich. 2007) (citing *Becherer v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 193 F.3d 415, 426 (6th Cir. 1999); 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 11:55, at 168 (4th ed. 2002)); *see also In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 31 (D.C. Cir. 2000) (nonsettling plaintiffs lacked standing to challenge class settlement because "the nonsettling plaintiffs have fully preserved their 'right to litigate their claims independently'") (citation omitted); *Mayfield v. Barr*, 985 F.2d 1090, 1092 (D.C. Cir. 1993) ("[N]onsettling parties in multi-party cases lack standing to object to settlement agreements on appeal.").

In re Vitamins Antitrust Class Actions, 215 F.3d 26, is instructive. There, the class had negotiated a settlement with certain defendants to resolve claims that the appellees had allegedly fixed prices on bulk vitamin sales in violation of antitrust laws. *Id.* at 28. The appellants – who opted out of a class settlement – moved to intervene and challenge the settlement. *Id.* The district court denied the motion to intervene, holding that the appellants lacked standing. *Id.* The D.C. Circuit agreed: "[C]lass members who have opted out of a 23(b)(3) class action have no standing to object to a subsequent class settlement" because "by opting out they 'escape the binding effect of the class settlement.'" *Id.* at 28-29 (quoting *Mayfield*, 985 F.2d at 1093 (class members who opt out cannot challenge class settlements because "those who fully preserve their legal rights cannot challenge an order approving an agreement resolving the legal rights of others")).

The same is true here. Class settlement or not, the MSA could not be challenged by petitioners because they did not participate in it and thus "escape[d] the binding effect of" the program it created. And because petitioners do not have standing, this Court lacks jurisdiction to review their challenge to the MSA. *See, e.g., Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986).

Petitioners' only apparent theory of standing is that they were injured because the MSA "limit[ed] . . . compensation to heart attacks, ischemic strokes and sudden cardiac death" (Pet. 33) – i.e., that petitioners were prejudiced because the MSA failed to cover their alleged injuries.[15] But that is not a cognizable basis for standing.

To be sure, courts have developed a narrow exception to the general rule barring challenges to settlements by non-settling parties where necessary to shield non-settling parties from "prejudice" created by a settlement. *In re Integra Realty*, 262 F.3d at 1102; *Zupnick*, 989 F.2d at 98; *Mayfield*, 985 F.2d at 1092-93; *Agretti v. ANR Freight Sys.*, 982 F.2d 242, 246-47 (7th Cir. 1992); *In re Sch. Asbestos Litig.*, 921 F.2d 1330, 1332 (3d Cir. 1990). But "'[p]rejudice' in this context means 'plain legal prejudice,' as when 'the settlement strips the party of a legal claim or cause of action,'" *In re Integra Realty*, 262 F.3d at 1102 (quoting *Mayfield*, 985 F.2d at 1093, and citing *Eichenholtz v. Brennan*, 52 F.3d 478, 482-83 (3d Cir. 1995), *Zupnick*, 989 F.2d at 98, *Alumax Mill Prods., Inc. v. Congress Fin. Corp.*, 912 F.2d 996, 1001-02 (8th Cir. 1990), *Waller*, 828 F.2d at 583, and *In re*

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[15] *See* note 3, *supra*.

Beef Indus. Antitrust Litig., 607 F.2d 167, 172 (5th Cir. 1979)), or where the settlement interferes "with a party's contract rights or a party's ability to seek contribution or indemnification," *Agretti*, 982 F.2d at 247 (citing *Quad/Graphics*, 724 F.2d at 1232).

By contrast, plain legal prejudice is not demonstrated by "[m]ere allegations of injury in fact or tactical disadvantage as a result of a settlement." *Agretti*, 982 F.2d at 247; *accord, e.g.*, *Eichenholtz*, 52 F.3d at 482-83; *Zupnick*, 989 F.2d at 98; *Alumax Mill Prods.*, 912 F.2d at 1001-02; *Waller*, 828 F.2d at 583; *In re Beef*, 607 F.2d at 172. Nor is it demonstrated by allegations that a defendant has settled with fewer than all plaintiffs, or that such a settlement will remove the "economic incentive to settle with" other parties. *Bass v. Phoenix Seadrill/78, Ltd.*, 749 F.2d 1154, 1165 (5th Cir. 1985). Otherwise, there could be no partial settlements, since "*any* settlement with less than all" parties produces some effect on non-settling parties. *Id.* at 1165.

Here, petitioners do not – and cannot – point to any provision in the MSA that affected the rights of any non-settling party to continue pursuit of his or her claim. To the contrary, petitioners have been the masters of their own destinies at all points in time; they filed their own complaints, were free to be represented by their counsel at monthly status conferences throughout the course of the Vioxx multidistrict proceedings, and were free to continue to litigate their claims despite exclusion from the MSA's terms.

Instead, petitioners rely on an assortment of arguments that are nothing more than complaints of strategic advantage and exclusion from settlement –

that Merck's defense strategy made it difficult to try a case (Pet. 27); that the NPC should have sought a settlement that covered petitioners (*id.* 21, 25-26 n.10); and that the district court should somehow have stopped a private settlement (*id.* 27-28).[16] But these are precisely the kinds of arguments that courts have uniformly held *cannot* confer standing on non-settling parties because petitioners do not contend that the settlement agreement extinguished their causes of action or other legal rights.

Accordingly, the court of appeals correctly held that petitioners sustained no plain legal prejudice from the MSA and thus lack standing to challenge it.

B. The District Court Acted Within Its Discretion In Adopting Discovery Orders For Non-Settling Plaintiffs.

Just as Petitioners have failed to raise any viable grounds that provide them standing to challenge the MSA, they have also failed to provide any reason why the district court abused its discretion in entering PTOs 28 and 29.

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[16] It is clear that the thrust of petitioners' complaint is not that they were unable to pursue their claims in court, but that they were somehow entitled to have their claims compensated under the MSA regardless of eligibility or merit. (*See* Pet. 22 (denying that petitioners ever want "their day in court" and stating that a "representative suit" – presumably one conceived, financed and prosecuted by others, since petitioners suggest that the production of one expert report is too burdensome for them (*id.* 15-16) – "may be an appropriate vehicle to resolve their claims").) Not surprisingly, petitioners offer no support for this absurd proposition.

As the court of appeals recognized, district courts have wide discretion to manage discovery in the proceedings over which they preside. *See, e.g.*, *Burns v. Universal Crop Prot. Alliance*, No. 4:07-CV-535, 2007 U.S. Dist. LEXIS 71716 (E.D. Ark. Sept. 25, 2007); *Ramos v. Playtex Prods., Inc.*, Nos. 08-CV-2703, 08-CV-2828, 08-CV 3352, 2008 WL 4066250, at *6 (N.D. Ill. Aug. 27, 2008). Moreover, such "broad discretion is particularly important in complex litigation." *Munoz v. Orr*, 200 F.3d 291, 305 (5th Cir. 2000); *see also Acuna*, 200 F.3d at 340; 6A Charles Alan Wright et al., *Federal Practice & Procedure* § 1525, at 112 (3d ed. 2010) ("Rule 16(c)(2)(L) explicitly authorizes the adoption of special procedures to expedite the adjudication of potentially difficult or protracted cases . . . ."). Indeed, management of discovery is one of the primary purposes underlying 28 U.S.C. § 1407. (*See* Pet. 26 (recognizing that MDL proceedings were designed to effectuate "consolidated discovery" and that "the district court necessarily had to enjoy broad ranging discretionary authority to manage litigation").)

A district court's discretion to manage complex, multidistrict proceedings includes the power to issue *Lone Pine* orders, as recognized by both the court below and other courts of appeals. *See Acuna*, 200 F.3d at 340 ("It was within the court's discretion to take steps to manage the complex and potentially very burdensome discovery that the cases would require."); *cf., e.g.*, *Medalie v. Bayer Corp.*, 510 F.3d 828, 830 (8th Cir. 2007) (acknowledging district court's use of such orders and upholding dismissal based on lack of compliance with such orders); *Claar v. Burlington N. R.R. Co.*, 29 F.3d 499, 500-01 (9th Cir. 1994) (upholding dismissal based on infirmity of expert affidavits

filed in connection with such orders). *Lone Pine* orders are widely recognized as an effective way to "cull potentially meritless claims and streamline litigation in complex cases," *Baker v. Chevron USA, Inc.*, No 1:05-CV-227, 2007 U.S. Dist. LEXIS 6601, at *2 (S.D. Ohio Jan. 30, 2007), by "requir[ing] plaintiffs to establish certain elements of their claims through expert affidavits," *Acuna*, 200 F.3d at 338.

Relatedly, dismissal is a firmly established sanction for noncompliance with the trial court's orders. *See, e.g.*, *Medalie*, 510 F.3d at 830 (affirming dismissal of personal injury claim because plaintiff had "failed to comply with the discovery order to submit an expert's report attesting personal injuries from use of Baycol"); *Acuna*, 200 F.3d at 340; *Claar*, 29 F.3d at 500-501 (affirming grant of summary judgment because physicians' affidavits failed to meet the requirements of case management order); *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1486 (5th Cir. 1990).

The district court acted consistently with this precedent in adopting PTOs 28 and 29, which were carefully crafted to "strike [a] balance between efficiency and equity," *In re Vioxx*, 557 F. Supp. 2d at 744, while preparing the parties for the next phase of litigation. These PTOs merely required all plaintiffs, including petitioners, to produce what experience has shown to be indispensable for trial: expert evidence of specific causation (i.e., that Vioxx actually caused the plaintiff's injury).

Petitioners question the merit of PTOs 28 and 29, contending that they were unnecessary and burdensome. But neither argument has merit. Even petitioners acknowledge the critical role played by

specific-causation evidence in the underlying litigation, arguing that most of Merck's trial wins resulted from the "individual plaintiff's inability to prove specific causation." (Pet. 29 n.12.) A preliminary determination of whether any such evidence exists for a particular plaintiff would thus figure heavily in both sides' decision either to try a case or attempt to resolve it in some other fashion.

Petitioners' claim of burdensomeness likewise fails. The PTOs simply required petitioners to produce evidence that they should have had before bringing suit; as the district court put it, "it is not too much to ask a Plaintiff to provide some kind of evidence to support their claim that Vioxx caused them personal injury." *In re Vioxx*, 557 F. Supp. 2d at 744 (*quoting Acuna*, 200 F.3d at 340); *see also Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 604 (5th Cir. 2006). For this reason, petitioners' suggestion that the PTOs "drove up plaintiffs['] litigation costs" (Pet. 16) is difficult to understand. If petitioners are suggesting that they were compelled to hire an expert, that suggestion lacks merit. The district court was clear that any report from a treating physician would do – it was "not requiring that Plaintiffs provide expert reports sufficient to survive a *Daubert* challenge or even provide an expert who will testify at trial." *In re Vioxx*, 557 F. Supp. 2d at 744.[17]

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[17] Petitioners' rhetoric regarding their inability to "reach the courthouse steps on the merits of their claims" rings hollow. (Pet. 27.) The Federal Rules establish myriad tools to weed out frivolous or meritless claims, and, thus, many such cases never reach the merits stage of litigation. *See, e.g.*, Fed. R. Civ. P. 12.

Petitioners also complain about the process by which PTOs 28 and 29 were adopted, contending that there was a "lack of adversarial presentation" – and that the orders subjected non-settling plaintiffs to "assembly line motions to dismiss." (Pet. 28, 30.) That is not a fair characterization. Although the district court entered the orders on its own initiative, those orders were subjected to testing by the adversarial process for more than a year thereafter, at the (repeated) behest of petitioners and other litigants below. The deadlines for compliance were officially extended once for all plaintiffs and then unofficially extended several additional times for petitioners, as they filed motion after motion seeking vacatur of the order and recusal of the district court judge below. It was only after petitioners made it apparent that they would never comply with these orders that the district court dismissed their claims.[18] As the court explained: "[I]t is now a year and a half since many of the plaintiffs in these cases were first directed to produce expert reports, but, rather than simply comply with the Court's orders, their attorney continues to argue that the deadlines are either too harsh or are inapplicable. . . . At this stage of the proceedings, dismissal with prejudice is the only appropriate remedy for the plaintiffs' repeated failure to produce reports in accordance with PTOs 28 and 29." (Pet. App. C, at 23a-24a.)

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[18] The district court also noted that petitioners' counsel had engaged in such tactics outside of the instant MDL proceeding and, as a result, had been denied *pro hac vice* admission in at least one other jurisdiction. (*See* Pet. App. C, at 25a & n.3.)

For all of these reasons, the district court acted well within its discretion in issuing and enforcing PTOs 28 and 29.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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January 21, 2011

APPENDIX

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

In re: VIOXX 1657	*	MDL Docket No.
	*	
PRODUCTS	*	
LIABILITY	*	
LITIGATION	*	SECTION L
	*	
	*	JUDGE FALLON
	*	
	*	MAG. JUDGE
	*	KNOWLES
* * * *	*	

THIS DOCUMENT RELATES TO ALL CASES

PRETRIAL ORDER NO. 28
***Prima Fade* Evidence of Usage, Injury and Causation),**

This Order requires all parties who are (1) plaintiffs with personal injury claims pending in MDL Docket No, 1657 ("Plaintiff' or "Plaintiffs") as of November 9, 2007, or (2) claimants who have sought tolling pursuant to the tolling agreement dated June 1, 2005 (collectively "Claimant" or "Claimants") to produce specified information regarding their claims, unless the claim is eligible for, and has been submitted to, the Resolution Program. This Order, however, does *not* apply to plaintiffs who file claims after November 9, 2007 ("Post 11.09 Plaintiffs"). Post

11.09 Plaintiffs are covered by a separate order, Pretrial Order No. 29. Persons who represent themselves *pro se* in this proceeding shall comply fully with all obligations required of counsel by this Order, unless otherwise stated.

I. PRESERVATION NOTICE REQUIREMENT

A. Within sixty (60) days of entry of this Order, counsel for a Plaintiff or Claimant subject to this Order shall notify the following individuals or entities, by registered mail, that they may have records relevant to the Plaintiff's or Claimant's claim in this MDL Proceeding ("Claim") and that any records relating to the Plaintiff or Claimant must be preserved pursuant to Pretrial Order No. 1 entered by this Court on February 17, 2005 (the "Notice"), pending collection by the Plaintiff or Claimant:

1. All Pharmacies that dispensed any medications to the Plaintiff or Claimant for the period from January 1, 1995 to the present;

2. All Physicians, Medical Facilities, other Healthcare Providers and/or other persons ("Other Providers") who Plaintiff or Claimant claims provided any samples of Vioxx to the Plaintiff or Claimant;

3. All Physicians, Medical Facilities and/or other Healthcare Providers who prescribed Vioxx for the Plaintiff or Claimant;

4. All Physicians and/or other Healthcare Providers who treated Plaintiff or Claimant for the period from January 1, 1995 to the present; and

5. If Plaintiff or Claimant is seeking lost wages, all of his employers for the period from three years prior to the date for which he is seeking lost wages through the last day for which Plaintiff or Claimant is seeking lost wages.

B. A copy of Pre Trial Order No. 1 shall be attached to the Notice and all copies of the Notice shall be preserved by Counsel for Plaintiff or Claimant for so long as the claim remains pending in this Proceeding.

C. By no later than March 15, 2008, Plaintiff or Claimant shall serve a statement listing the names and addresses of all individuals or entities to which Notices were sent, along with copies of the Notices and a signed

certification that the Notices were sent as required by this Order. Service by Plaintiffs shall be made in accordance with the service procedures of PTO No. 8 and paragraphs 5 through 7 of PTO 18C. Service by Claimants shall be made on Susan Giamportone at Womble Carlyle Sandrige & Rice, PLLC.

D. Plaintiffs or Claimants who fail to fully comply with the requirements of this Order shall be given notice by e-mail or fax from Defendants' Liaison Counsel or his designee and shall be provided thirty (30) additional days to cure such deficiency ("Cure Period"). No other extensions will be granted, except for good cause shown. If Plaintiff or Claimant fails to cure the deficiency within the Cure Period, Defendant's Liaison Counsel shall file a Motion to Show Cause why the claim should not be dismissed with prejudice or, if tolled, why the tolling for that Claimant should not be terminated. Plaintiff or Claimant shall thereupon have thirty (30) days to respond to the Notice to Show Cause. Any failure to respond to the Motion within the required period of time shall lead to the dismissal of the claim with prejudice or, if tolled, the termination of tolling for that claim, except for good cause shown.

E. Plaintiff or Claimant may not seek to introduce into evidence at trial any document or information asserting that Vioxx was dispensed by a pharmacy or that Vioxx was provided to the Plaintiff or Claimant as a sample if a Notice were not sent to the Plaintiff's or Claimant's pharmacy, physician, other healthcare provider and/or Other Provider as required by this Order, except upon leave of court for good cause shown. A Plaintiff or Claimant who fails to comply with this Order may also be subject to other sanctions or orders.

II. DISCOVERY REQUIREMENTS

A. All Plaintiffs or Claimants who claim to have suffered an injury as a result of taking Vioxx must produce all of the information described in this Section II unless (a) the injury alleged is a Myocardial Infarction ("MI"), Sudden Cardiac Death ("SCD"), or Stroke as those terms are defined, infra., in Section III, *and* (b) the Plaintiff or Claimant has submitted the claim to the Resolution Program:

1. All pharmacy records regarding the dispensing of drugs to the Plaintiff or Claimant for the period from January 1, 1995 to

the present, along with a signed certification from the respective pharmacy or pharmacies indicating that the production is complete.

2. If any death is claimed, a statement to that effect along with a copy of the death certificate and autopsy report, if one was performed.

3. For Plaintiffs or Claimants alleging a MI, SCD or Stroke Injury, an Amended and Supplemental Plaintiff Profile Form" ("ASPPF") and authorizations or "Claimant Profile Form" ("CPF") in a form attached hereto as Exhibit A unless Plaintiff or Claimant has as of the date of this Order submitted a Plaintiff Profile Form or Claimant Profile Form. Service by Plaintiffs shall be made in accordance with the service procedures of PTO No. 8 and paragraphs 5 through 7 of PTO 18C. Service by Claimants shall be made on Susan Giamportone at Womble Carlyle Sandrige & Rice, PLLC.

4. For Plaintiffs not alleging a MI, SCD or Stroke Injury, an ASPPF and authorizations in the forms attached hereto as Exhibit A and served in accordance with the service methods of PTO 8 and paragraphs 5 through 9 of 18C.

5. Answers to the Interrogatories set out as Exhibit B. Service by Plaintiffs shall be made in accordance with the service procedures of PTO No. 8 and paragraphs 5 through 7 of PTO 18C. Service by Claimants shall be made on Susan Giamportone at Womble Carlyle Sandrige & Rice, PLLC.

6. All medical records relating to the Plaintiff or Claimants from all healthcare providers requested in the Amended and Supplemental Plaintiff Profile Form for the period from January 1, 1995 to the present, along with a signed certification from each healthcare provider who has records relating to the Plaintiff indicating that all records in the possession, custody or control of the Provider have been produced. Service by Plaintiffs shall be made in accordance with the service

procedures of PTO No. 8 and paragraphs 5 through 7 of PTO 18C. Service by Claimants shall be made on Susan Giamportone at Womble Carlyle Sandrige & Rice, PLLC.

7. An affidavit signed by the Plaintiff or Claimant (i) attesting that records have been collected from all pharmacies that dispensed drugs to, or for, the Plaintiff or Claimant; (ii) attesting that all medical records described in subparagraph (6) above have been collected; and (iii) attesting that all records collected pursuant to subparagraphs A (1), (2) and (6) have been produced pursuant to this Order, along with an index or list identifying the source of the records. Service by Plaintiffs shall be made in accordance with the service procedures of PTO No. 8 and paragraphs 5 through 7 of PTO 18C. Service by Claimants shall be made on Susan Giamportone at Womble Carlyle Sandrige & Rice, PLLC.

8. A Rule 26(a)(2) case specific expert report from a medical expert attesting (1) to a

reasonable degree of medical probability that the Plaintiff or Claimant suffered an injury and (ii) that Vioxx caused the injury. The case specific expert report must include (i) an explanation of the basis of the attestation that Vioxx caused the Plaintiff or Claimant to suffer the injury, (ii) an identification of any other causes that were considered in formulating the opinion, (iii) a description of the specific injuries allegedly suffered; (iv) a description of the specific medical findings that support the diagnosis of those injuries; and (v) and identification of all documents relied on by the expert in forming his opinions.

B. If any of the documents described in paragraphs (A) (1), (2) and (6) above do not exist, the Plaintiff shall state that fact in his or her affidavit and the reason why they do not exist and provide a certified "No Records Statement" from the pharmacy or healthcare provider.

C. Plaintiffs and Claimants shall produce the items set forth above in this Section II in accordance the following schedule:

1. For Plaintiffs and Claimants whose last name begins with the letters A through L, on or before May 1, 2008;

2. For Plaintiffs and Claimants whose last name begins with the letters M through Z, on or before July 1, 2008.

3. Plaintiffs shall serve the items set forth above in accordance with the service procedures of PTO 8 and paragraphs 5 through 7 of PTO 18C. Claimants shall serve the items set forth above on Susan Giamportone at Womble Carlyle Sandrige & Rice, PLLC

4. Plaintiffs whose cases are subsequently transferred or removed to this Court shall produce the items set forth above within sixty (60) days of removal (measured from the date the notice of removal is filed in this Court) or transfer (measured from the date of filing in this Court of the Transfer Order issued by the Judicial Panel on Multidistrict Litigation) of their case to this proceeding.

D. Plaintiffs or Claimants who fail to fully comply with the requirements of this Order shall be given notice by e-mail or fax from Defendants' Liaison Counsel or his designee and shall be provided thirty (30) additional days to cure such deficiency ("Cure Period"). No other extensions will be granted, except for good cause shown. If Plaintiff or Claimant fails to cure the deficiency within the Cure Period, Defendant's Liaison Counsel shall file a Motion to Show Cause why the claim should not be dismissed with prejudice or, if tolled, why the tolling for that Claimant should not be terminated. Plaintiff or Claimant shall thereupon have thirty (30) days to respond to the Notice to Show Cause. Any failure to respond to the Motion within the required period of time shall lead to the dismissal of the claim with prejudice or, if tolled, the termination of tolling for that claim.

E. Nothing in this Order abrogates or replaces each Plaintiff's obligation to submit the Plaintiff Profile Form, authorizations, and other materials required under Pretrial Order 18C. The Plaintiff need not re-submit a Plaintiff Profile Form if one has already been submitted with respect to his or her claim.

III. DEFINITIONS

A. For purposes of this Order only, "Myocardial Infarction" ("MI") is defined as follows:

1. A final or discharge diagnosis in contemporaneous medical records of a myocardial infarction or heart attack; or

2. A diagnosis or affirmative finding in the contemporaneous medical records (e.g., a report of consultation) by a cardiologist of a myocardial infarction or heart attack; or, within 14 days of discharge from the hospitalization related to the Event, an independent diagnosis by a treating cardiologist that the Event was a myocardial infarction or heart attack; provided that, in either instance, the final or discharge diagnosis does not rule out a myocardial infarction; or

3. If the medical records are silent as to whether or not plaintiff had a myocardial infarction, new

pathological Q waves in two or more contiguous leads; or

4. If the medical records are silent as to whether or not plaintiff had a myocardial infarction, (i) Signs and symptoms described in medical records of a heart attack (including but not limited to chest pain, pressure, tightness or discomfort, pain or discomfort in the upper areas of the body including but not limited to one or both arms, the back, neck, jaw or stomach, or shoulders; shortness of breath, weakness, dizziness, cold sweat, or excessive sweating, nausea, weakness, fatigue, loss of consciousness or posture, lightheadedness, feeling of faintness, heart-burn or indigestion sensations, feelings of restlessness or anxiousness, a sense of impending doom, disorientation, lips, hands or feet turning slightly blue, abnormal heart rhythms (arrhythmias), or loss of consciousness, cardiac arrest, blood pressure fluctuations or drops requiring medical intervention) or new ischemic ST-T wave changes on an electrocardiogram in two or more contiguous leads; AND (ii) a

rise and fall of cardiac enzymes that includes a rise in serum creatine kinase MB (CK-MB) to greater than two times the upper limit of normal (based on the individual's laboratory's normal range) or a rise in serum cardiac troponin greater than two times the upper limit of normal that a given laboratory considers diagnostic for infarctions. (In the event that the laboratory records do not reflect the normal diagnostic range for troponin that is utilized by that specific laboratory, a rise in the troponin to greater than 1.5 ng/ml shall be deemed to indicate a myocardial infarction.)

5. An event is not a myocardial infarction under definition Nos. 3 or 4 above, if myocardial infarction is ruled out as a diagnosis in the discharge summary or by an in-house cardiology consult at the time of the event, or the final diagnosis is angina or unstable angina.

B. For purposes of this Order only, "Sudden Cardiac Death" ("SCD") is defined as a witnessed instantaneous or near-instantaneous unexplained death

that occurs without warning or within one hour of non-diagnostic symptoms, or, an unwitnessed, unexpected sudden death in which criteria for a fatal coronary, cerebrovascular event or other cause or event are not met.

C. For purposes of this Order only, "Ischemic Stroke" ("Stroke") is defined as:

1. A final or discharge diagnosis in contemporaneous medical records of an ischemic stroke or ischemic cerebrovascular event or accident (*i.e.*, ischemic stroke, intracranial thrombosis, cerebral embolism, thrombotic stroke, embolic stroke, lacunar infarct, lacunar stroke, thrombotic occlusion, cerebrovascular event or accident that is not a primary hemorrhagic event, and cerebral infarction; or a hemorrhagic stroke that is secondary to the terms previously listed); or

2. If the final or discharge diagnosis is silent as to whether or not claimant had an Ischemic Stroke, a diagnosis or affirmative finding in the contemporaneous medical records (*e.g.*, a report of

consultation) by a neurologist of an Ischemic Stroke; or, within 14 days of discharge from the hospitalization related to the Event, an independent diagnosis by a treating neurologist that the Event was an Ischemic Stroke.

3. For purposes of this Order only, an Event is **not** an Ischemic Stroke if:

a. stroke or cerebrovascular accident is ruled out as a diagnosis in the discharge summary or by a treating neurologist within 14 days of discharge from the hospitalization related to the Event;

b. hemorrhagic stroke or hemorrhagic cerebrovascular accident is the diagnosis in the discharge summary or by a treating neurologist within 14 days of discharge from the hospitalization related to the Event, This definition does not include a hemorrhagic stroke that

is secondary to an Ischemic Stroke; or

c. transient ischemic attack is the diagnosis in the discharge summary or is the diagnosis of a treating neurologist within 14 days of discharge from the hospitalization related to the Event.

IV. PENALTIES FOR FRAUD AND DECEPTION

Any Plaintiff (and his or her attorneys) who submits false or intentionally misleading information, or otherwise attempts to satisfy the documentation requirements of this Order through any form of deception, dishonesty or fraud shall be subject to appropriate sanctions (including monetary sanctions and costs) and dismissal with prejudice pursuant to Fed. R. Civ. P. 37.

New Orleans, Louisiana, this _____ day of _____, 2007.

_____

ELDON E. FALLON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

In re: VIOXX	*	**MDL Docket No. 1657**
	*	
PRODUCTS	*	
LIABILITY	*	
LITIGATION	*	**SECTION L**
	*	
	*	**JUDGE FALLON**
THIS DOCUMENT		
RELATED TO		
ALL CASES		
	*	**MAG. JUDGE**
	*	**KNOWLES**
* * * *	*	

PRETRIAL ORDER NO. 29
Rules and Procedures Relating to
All Cases Filed or Transferred On or After
November 9, 2007

This Order applies to all plaintiffs who file personal injury claims directly in, or whose claims are transferred into, MDL Docket No. 1657 on or after November 9, 2007 ("Post 11.09 Plaintiffs"). Persons who represent themselves *pro se* in this proceeding shall comply fully with all obligations required of counsel by this Order, unless otherwise stated.

I. PRESERVATION NOTICE REQUIREMENT

A. Prior to filing a claim, counsel — or if a plaintiff is proceeding *pro se*, the plaintiff — shall be responsible for ensuring that all records in the possession of the plaintiffs' pharmacies and healthcare providers as described in paragraph (B) below have been preserved, collected and reviewed. Within thirty (30) days of agreeing to accept a client for purposes of pursuing Vioxx litigation, counsel shall notify the individuals or entities listed below in Paragraph B, by registered mail, that they may have records relevant to the putative plaintiff's ("Plaintiff or Plaintiff's") claim in this MDL proceeding ("Claim") and that any records relating to the Plaintiff must be preserved pursuant to Pretrial Order No. 1 entered by this Court on February 17, 2005 (the "Notice"), pending collection by the Plaintiff. Plaintiffs proceeding *pro se* must notify the individuals or entities listed below in Paragraph 2 within thirty (30) days of filing an action.

B. The following individuals or entities must be notified pursuant to Paragraph 1 above:

1. All Pharmacies that dispensed any medications to the Plaintiff for the period from January 1, 1995 to the present;

2. All Physicians, Medical Facilities, other Healthcare Providers and/or others persons ("other Providers") who Plaintiff claims provided any samples of Vioxx to the Plaintiff;

3. All Physicians, Medical Facilities and/or other Healthcare Providers who prescribed Vioxx for the Plaintiff;

4. All Physicians and/or other Healthcare Providers who treated Plaintiff for the period from January 1, 1995 to the present; and

5. If Plaintiff is seeking lost wages, all of his/her employers for the period from three years prior to the date for which he/she is seeking lost wages through the last day for which Plaintiff or Claimant is seeking lost wages.

C. A copy of Pre Trial Order No. 1 (Paragraph 13 — Preservation of

Evidence) shall be attached to the Notice and all copies of the Notice shall be preserved by Counsel for Plaintiff for so long as the claim remains pending in this Proceeding.

D. Within ten (10) days of filing a claim, Plaintiff shall serve a statement listing the names and addresses of all individuals or entities to which Notices *were* sent, along with copies of the Notices and a signed certification that the Notices were sent as required by this Order. Service shall be made in accordance with the service procedures of PTO No. 8 and paragraphs 5 through 7 of PTO 18C.

E. Plaintiffs who fail to fully comply with the requirements of this Order shall be given notice by e-mail or fax from Defendants' Liaison Counsel or his designee and shall be provided thirty (30) additional days to cure such deficiency ("Cure Period"). No other extensions will be granted. If Plaintiff fails to cure the deficiency within the Cure Period, Defendant's Liaison Counsel shall file a Motion to Show Cause why the claim should not be dismissed with prejudice. Plaintiff shall thereupon have thirty (30) days to respond to the Notice to Show Cause. Any failure to respond to the Motion

within the required period of time shall lead to the dismissal of the claim with prejudice, except for good cause shown.

F. Plaintiff may not seek to introduce into evidence at trial any document or information asserting that Vioxx was dispensed by a pharmacy or that Vioxx was provided to the Plaintiff as a sample if a Notice were not sent to the Plaintiff's pharmacy, physician, other healthcare provider and/or Other Provider as required by this Order, except upon leave of court for good cause shown. A Plaintiff who fails to comply with this Order may also be subject to other sanctions or orders.

II. DISCOVERY REQUIREMENTS

A. Within forty-five (45) days of filing his or her claim in this MDL, or within forty-five (45) days of their case being transferred (measured from the date of filing with this Court of the Transfer Order issued by the Judicial Panel on Multidistrict Litigation) or removed (measured from the date of filing with this Court of the Notice of Removal) to this MDL, all Post 11.09 Plaintiffs who claim to have suffered an injury as a result of the use of Vioxx must produce the following information:

1. All pharmacy records regarding the dispensing of drugs to the Plaintiff for the period from January 1, 1995 to the present, along with a signed certification from the respective pharmacy or pharmacies indicating that the production is complete.

2. All medical records relating to the Plaintiff from all healthcare providers requested in the Amended and Supplemental Plaintiff Profile Form for the period from January 1, 1995 to the present, along with a signed certification from each Healthcare Provider who has records relating to the Plaintiff indicating that all records in the possession, custody or control of the Provider have been produced.

3. If any death is claimed, a statement to that effect along with a copy of the death certificate and autopsy report, if one was performed.

4. An Amended and Supplemental Plaintiff Profile Form (attached as Exhibit A), records requested therein, and executed

Authorizations for Release of Records pursuant to PTO 18A, B or C, as applicable. Service by Plaintiffs shall be made in accordance with the service procedures of PTO No. 8 and paragraphs 5 through 7 of PTO IBC. Service by Claimants shall be made on Susan Giamportone at Womble Carlyle Sandrige & Rice, PLLC.

5. Answers to the Interrogatories set our in Exhibit B. Service by Plaintiffs shall be made in accordance with the service procedures of PTO No. 8 and paragraphs 5 through 7 of PTO 18C. Service by Claimants shall be made on Susan Giamportone at Womble Carlyle Sandrige & Rice, PLLC.

6. An affidavit signed by the Plaintiff (i) attesting that records have been collected from all pharmacies that dispensed drugs to, or for, the plaintiff; (ii) attesting that all medical records described in paragraph (2) above have been collected; (iii) attesting that all records collected pursuant to subparagraphs (1), (2) and (3) have been produced

pursuant to the Order, along with an index or list identifying the source of the records; and (iv) citing the specific page of the medical records containing the diagnosis of the alleged injury.

7. A Rule 26(a)(2) case-specific expert report from a medical expert attesting (i) that the Plaintiff suffered an injury and (ii) that Vioxx caused the injury. The case-specific expert report must include (i) an explanation of the bases of the attestation that Vioxx caused the plaintiff to suffer the injury; (ii) an identification of any other causes that were considered in formulating the opinion; (iii) a description of the specific injuries allegedly suffered; (iv) a description of the specific medical findings that support the diagnosis of those injuries; and (v) an identification of all documents relied on by the expert in forming his opinions.

B. If any of the documents described in paragraphs A (1), (2) and (3) do not exist, the Plaintiff shall state that fact in his or her affidavit and the reason why they do not exist and provide a certified "No

Records Statement" from the pharmacy or healthcare provider.

C. Plaintiffs who fail to fully comply with the requirements of this Order shall be given notice by e-mail or fax from Defendants' Liaison Counsel or his designee and shall be provided thirty (30) additional days to cure such deficiency ("Cure Period"). No other extensions will be granted, except for good cause shown. If Plaintiff fails to cure the deficiency within the Cure Period, Defendant's Liaison Counsel shall file a Modem to Show Cause why the claim should not be dismissed with prejudice. Plaintiff shall thereupon have thirty (30) days to respond to the Notice to Show Cause. Any failure to respond to the Motion within the required period of time shall lead to the dismissal of the claim with prejudice.

D. Nothing in this Order abrogates or replaces each Plaintiff's obligation to submit the Plaintiff Profile Form, authorizations, and other materials required under Pretrial Order 18C. The Plaintiff need not re-submit a Plaintiff Profile Form if one has already been submitted with respect to his or her claim.

III. ATTORNEYS' FEES FOR POST 11.09 PLAINTIFFS

This Court finds that:

A. The Status of the Litigation:

1. Prior to September 30, 2004, approximately 400 lawsuits had been filed against Merck & Co. by plaintiffs alleging various injuries from the use of Vioxx. In New Jersey, an Order had been entered on May 20, 2003 establishing a coordinated proceeding for Vioxx litigants and, on September 30, 2002, an Order was entered in California for the same purpose.

2. On September 30, 2004, Merck withdrew Vioxx from the market. The withdrawal of Vioxx led to extensive publicity nationwide in newspapers and magazines, on television and radio, and across the Internet. While plaintiffs' counsel had extensively advertised seeking clients to pursue claims against Merck relating to the use of Vioxx before September 30, 2004, that

advertising increased markedly throughout the country after the withdrawal. Like the publicity relating to the withdrawal, the advertising apprised the public of possible claims they might have against Merck in connection with the use of Vioxx.

3. By December 31, 2004, three months after the withdrawal of Vioxx, approximately 923 lawsuits were on file, encompassing approximately 3291 plaintiffs.

4. On February 16, 2005, the Judicial Panel on Multi District Litigation ruled that cases alleging injury from the use of Vioxx pending in various federal courts across the country should be transferred to one district court for coordination. The Panel decided that the cases should be transferred to the Eastern District of Louisiana in New Orleans and appointed the undersigned to conduct the consolidated and coordinated proceedings.

5. By the first year anniversary of the withdrawal of Vioxx, more than 8,900 Vioxx lawsuits had been filed involving more than 18,500 plaintiffs. As of the date of this Order, there are more than 26,800 active Vioxx cases on file in various courts throughout the country, involving more than 47,500 plaintiffs and an additional 13,000 claims on tolling agreements for a total of more than 60,500 claimants. By any measure, the scale of this litigation is large.

6. Discovery in this litigation has also been extensive. More than 54 million pages of documents and a terabyte of data have been produced by Merck pursuant to various requests from plaintiffs' counsel along with another 86 million pages of data from Merck Profile Forms. More than 1,800 depositions have also been taken in the litigation and depositions have consumed more than 2,000 days and comprise more than 380,000 pages of testimony. Also, more than fifteen trials have been conducted, including six in this Proceeding;

B. Pharmaceutical Tort Litigation and Contingent Fees.

1. It is the practice in the United States for lawyers bringing claims on behalf of clients in personal injury actions to be compensated pursuant to contingent fee agreements. That is, the lawyer's fee is contingent on the lawyer's success in the recovery of compensation from another party for his client.

2. In large-scale pharmaceutical tort litigation, it is particularly commonplace for lawyers representing plaintiffs to be compensated through contingent fees.

3. Large-scale pharmaceutical tort litigation (which can be similar to traditional mass tort litigation in scale) can be, and usually is, extraordinarily expensive, particularly in the early stages. It is well understood that proving cases in mass tort litigation, at least at first, is expensive. Experts of various kinds may be needed and discovery from the

defendants may take a long time and much effort.

4. However, the cost and risk inherent in prosecuting the first series of claims in a large-scale pharmaceutical tort is not the same throughout the litigation.

5. Because of the extensive publicity and extensive advertising that followed the withdrawal of Vioxx, users of Vioxx (and their lawyers) have had ample notice of the possibility that they may have a claim against Merck in connection with their use of the drug. The uncertainty of the number of potential claims in a litigation of this magnitude makes the management of this proceeding exceedingly difficult both for the parties and the Court.

C. The Vioxx litigation is an extremely mature litigation. To date, MDL and state court lawyers have tried 17 cases and taken over 1,800 depositions; more than 50 million pages of documents have been produced, and an enormous volume of electronic data, and substantial Third Party discovery has occurred. Because of this extensive work

done by the PSC and certain state court lawyers, the cost of litigating Vioxx claims has been substantially reduced.

D. Given the extensive amount of discovery and trial preparation that has been undertaken and already achieved — as well as the work on, and lessons learned from, bellwether trials conducted in this Court and others over the last several years — counsel filing new claims can reasonably expect to expend much less time and resources prosecuting those cases than counsel who have been involved in those proceedings from the beginning, and I encourage counsel to consider such disparity in negotiating attorneys' fees.

IV. PENALTIES FOR FRAUD AND DECEPTION

Any Plaintiff (and his or her attorneys) who submits false or intentionally misleading information, or otherwise attempts to satisfy the documentation requirements of this Order through any form of deception, dishonesty or fraud shall be subject to appropriate sanctions (including monetary sanctions and costs) and dismissal with prejudice pursuant to Fed. R Civ. P. 37. Post 11.09 Plaintiffs who fail to fully comply with the requirements of this Order may be subject to sanctions and dismissal of their claims pursuant to Fed. R. Civ. 37.

New Orleans, Louisiana, this ____ day of November, 2007.

_____

ELDON E. FALLON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

In re: VIOXX	*	MDL Docket No. 1657
	*	
PRODUCTS	*	
LIABILITY	*	
LITIGATION	*	SECTION L
	*	
	*	JUDGE FALLON
This document	*	
related to:	*	
ALL CASES	*	MAG. JUDGE
	*	KNOWLES
	*	
* * * *	*	

PRETRIAL ORDER NO. 30

Having reviewed the Resolution Program agreement entered into by the PSC and Merck on November 9, 2007, the Court finds that with some exceptions, further activity in this MDL proceeding should be stayed temporarily in order to give each eligible plaintiff, with the advice of counsel, sufficient time to determine whether it is in his or her best interest to participate in the Resolution Program, and to give counsel sufficient time to comprehend the Resolution Program and advise their clients accordingly.

Accordingly, the Court hereby **ORDERS** as follows.

- All activities in this MDL proceeding (including all activities in each case in which a plaintiff is eligible to participate in the Resolution Program) are hereby stayed pending further order of this Court, except as follows:
  - The stay shall not apply to cases currently pending in this proceeding that are not eligible for participation in the Resolution Program, but only to the extent that plaintiffs are required to engage in certain discovery and other pretrial activities by Pretrial Order 28, entered by this Court on November 9, 2007.
  - The stay shall not apply to any cases in this proceeding (or that may be later transferred into this proceeding) filed on or after November 9, 2007, but only to the extent that plaintiffs are required to engage in certain discovery and other pretrial activities by Pretrial Order 29, entered by this Court on November 9, 2007.
  - This Order shall not operate to stay the various *de bene esse* depositions that the parties previously scheduled, including the discovery depositions related thereto. Such depositions will be important to the outcome of this litigation, regardless of whether individual plaintiffs choose to participate in the Resolution Program.

- At the appropriate time, the Court intends to issue a further order lifting this stay with respect to the eligible plaintiffs who decide not to participate in the Resolution Program. Further, the Court will consider motions to lift the stay with respect to specific activities in this litigation upon good cause shown.

IT IS SO ORDERED.

New Orleans, Louisiana, this _____ day of November, 2007.

_____

ELDON E. FALLON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

In re: VIOXX	*	MDL Docket No. 1657
	*	
PRODUCTS	*	
LIABILITY	*	
LITIGATION	*	SECTION L
	*	
	*	JUDGE FALLON
	*	
	*	MAG. JUDGE
	*	KNOWLES
* * * * *		

THIS DOCUMENT RELATES TO ALL CASES

PRETRIAL ORDER No. 31
(Registration of Claims)

The Court hereby orders as follows with respect to the registration of claims:

(1) The Court hereby orders the registration of claims as follows:

(a) All Counsel of Record in this proceeding shall be responsible for designating Primary Counsel for any claim pending in this coordinated proceeding in which they have an Interest (as defined below in paragraph 5) and that Primary Counsel

shall register such claims in accordance with this Order.

(b) All Counsel of Record in this proceeding who have at any time submitted a request for tolling for a claimant (hereinafter "Tolling Claimant") pursuant to the Notice of Filing of Tolling Agreement which was filed in Federal Multidistrict Litigation No. 1657 on June 9, 2005 (hereinafter "Tolling Agreement") shall designate Primary Counsel for each Tolling Claimant's claims, and that Primary Counsel shall register such claims in accordance with this Order.

(c) All Counsel of Record with claims pending in this proceeding shall register (or *ensure* that other attorneys register) all claims in which they have an Interest (as defined below in Paragraph 5) that are pending in any court or other tribunal in the United States.

(d) All persons who represent themselves *pro se* in this proceeding shall register their claims in accordance with Paragraph 4 below.

(2) The registration of claims by counsel shall be provided in the form of a Registration Affidavit and its Exhibit 1, altogether set forth as Exhibit A to this Order. Counsel shall provide the information required by Exhibit A completely and accurately. The form shall provide the information required as of (a) October 1, 2007, (b) November 9, 2007, and (c) the date on which the Registration Affidavit is served and filed. The

Registration Affidavit shall be filed no later than January 15, 2008.

(3) Registration Affidavits, along with their exhibits, shall be served on Defendant Merck & Co., Inc. ("Merck"), the Executive Committee to the Plaintiffs' Steering Committee ("PEC"), and the Claims Administrator.

(4) Persons who represent themselves *pro se* in this proceeding shall complete the *Pro Se* Registration Affidavit attached hereto as Exhibit B and shall serve Defendant Merck, PEC, and the Claims Administrator, by no later than January 15, 2008.

(5) Counsel shall be deemed to have an "Interest" in the claim of a Plaintiff or Tolling Claimant if Counsel or any person affiliated with, or related in any way to, Counsel: (a) has an engagement or retainer agreement with such Plaintiff or Tolling Claimant; (b) is listed as the counsel of record for such Plaintiff in filed pleadings related to Vioxx; (c) has entered a Tolling Claimant into a Tolling Agreement; (d) has entered an appearance for such Plaintiff or Tolling Claimant in any legal action related to Vioxx; (e) would benefit directly or indirectly from any payment to settle any claim of such Plaintiff or Tolling Claimant connected with Vioxx; or (f) otherwise has any financial interest of any kind whatsoever in any claim of such Plaintiff or Tolling Claimant connected with Vioxx.

(6) Primary Counsel shall file the Registration Affidavit and its Exhibit 1 in the manner applicable in this coordinated proceeding for filing documents with the Court under seal. *Pro Se* Claimants shall do likewise with respect to their *Pro Se* Registration Affidavit. Primary Counsel shall also

serve the Registration Affidavit and its Exhibit 1 on Merck, the PEC, and the Claims Administrator via electronic mail. Specifically, Primary Counsel shall attach three files to a single electronic mail message—(i) the executed Registration Affidavit in Adobe pdf format; (ii) Exhibit 1 to the Registration Affidavit in Excel format; and (iii) a certification of service in Adobe pdf format—and send that message to the following addresses:

a. **For Merck:**
registration@hugheshubbard.com

b. **For the PEC:** rherman@hhkc.com

c. **For the Claims Administrator:**
claimsadmin@browngreer.com

(7) The subject line in the email should state: "Registration Affidavit and Exhibit 1 for [insert name of firm]. *Pro Se* Claimants shall serve their Registration Affidavits on Merck, PEC and the Claims Administrator at the above email addresses. If the *Pro Se* Claimant does not have access to email, the Plaintiff or Tolling Claimant shall send the Registration Affidavit via U.S. Mail **postmarked no later than January 8, 2008** to:

Claims Administrator
115 S. 15th Street
Suite 400
Richmond, VA 23219-4209
Main Number: 804.521.7200

(8) Primary Counsel and *Pro Se* Claimants must certify in lieu of oath [pursuant to 28 U.S.C. § 1746] that the information contained in the

Registration Affidavit is true and correct to his or her knowledge. Intentionally incomplete or misleading responses shall subject Primary Counsel and *Pro Se* Claimants to sanctions.

(9) Primary Counsel shall serve a revised Registration Affidavit and Exhibit 1 when he or she acquires or loses his or her Interest in a Plaintiff's or Tolling Claimant's claim, when he or she becomes Primary Counsel or ceases to be Primary Counsel, or when because of changed circumstances his or her Registration Affidavit otherwise becomes materially untrue, in whole or in part. In such instances, Primary Counsel must serve a true and correct Registration Affidavit within 30 days of the changed circumstances. The revised Registration Affidavit shall identify all Plaintiffs and Tolling Claimants in whose claims Primary Counsel has an Interest as of the date that he or she executes the Registration Affidavit. This obligation shall terminate on September 1, 2008.

(10) The Court expects all Counsel and all *Pro Se* Plaintiffs and Tolling Claimants to comply with this Order. Failure to meet the requirements of this Order by the deadlines set herein will subject non-compliant Counsel to a show cause hearing as to why they have not complied with this Order and as to why claims in which they have an Interest should not be dismissed.

_____, this _____ day of
_____, 2007.

_____
JUDGE

Exhibit A

Registration Affidavit

I, _____, hereby certify [pursuant to 28 U.S.C. § 1746] as follows:

1. I am an attorney in good standing who is admitted to practice law in the State of _____ _____. The name and address of my law firm are:

_____

Law Finn

_____

Street

_____

City State Zip Code

2. I make this certification pursuant to Pretrial Order No. ___ entered in [the current coordinated proceeding].

3. Exhibit 1 to this certification contains a true and complete list of all of the Plaintiffs and/or Tolling Claimants in which I have an "Interest" and for whom I am "Primary Counsel" along with a notation of all firms with an Interest in Each Claim as of October 1, 2007.

I certify under penalty of perjury that the foregoing is true and correct.

_____

Primary Counsel

Sign ONE of the statements below:

1. I, _____, on behalf of myself and all other counsel with an Interest in the cases listed in Exhibit 1, agree to the terms of the MSA and will recommend all Plaintiffs and/or Tolling Claimants listed on Exhibit I should enroll in the Program.

_____

OR

2. I, _____, do not agree to the terms of the MSA and will not recommend that any of the Plaintiffs and/or Tolling Claimants listed on Exhibit I enroll in the Program.

_____

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

IN RE: VIOXX	:	MDL NO. 1657
	:	
PRODUCTS	:	
LIABILITY	:	
LITIGATION	:	SECTION: L
	:	
	:	JUDGE FALLON
	:	MAG. JUDGE KNOWLES

.. ..

THIS DOCUMENT RELATES TO:

David Agard, et al. v. Merck & Co.,	05-1089
Glenn Dier, et al. v. Merck & Co.,	05-1088
Adnan Aljibory, et al. v. Merck & Co.,	05-1090
Rosemary Holobosky, et al. v. Merck & Co.,	05-1091
Marjorie Connolly, et al. v. Merck & Co.,	06-2708
Marilyn Core, et al. v. Merck & Co.,	05-2583
Carlo Devincentiis, et al., v. Merck & Co.,	05-2297
Kathleen Hoffner, et al. v. Merck & Co.,	06-2238
Robert D. Gates, et al. v. Merck & Co.,	05-6221

ORDER & REASONS

Before the Court are certain Plaintiffs' Motion for Miscellaneous Relief (Rec. Doc. 14938) and Motion for a Stay (Rec. Doc. 16803). For the following reasons, both motions are DENIED.

I. BACKGROUND

On November 9, 2007, the parties announced the establishment of a Vioxx Resolution Program that encompasses all claims that allege a heart attack, sudden cardiac death, or stroke.[1] Also on that date, the Court entered two pre-trial orders requiring Plaintiffs to provide certain information to Merck by certain deadlines. Pre-Trial Order No. 28 ("PTO 28") requires all plaintiffs and tolling agreement claimants with claims pending as of November 9, 2007, to produce specified information regarding their claims if they are not eligible for or have not submitted their claims to the Vioxx Resolution Program. Under PTO 28, plaintiffs and tolling agreement claimants must provide case-specific expert reports to Merck by certain dates based on the first letter of the plaintiff's last name. Plaintiffs whose last names begin with the letters A through L were initially required to submit this information by May 1, 2008, and plaintiffs whose last names begin

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[1] For a more detailed factual background describing the events that took place before the inception of this Multidistrict Litigation, see *In re Vioxx Prods. Liab. Litig.*, 401 F. Supp. 2d 565 (E.D. La. 2005) (resolving *Daubert* challenges to a number of expert witnesses). For a more detailed factual background describing the terms of the Vioxx Master Settlement Agreement and the events that took place after the parties reached a settlement, see *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, 2008 WL 3285912 (E.D. La. Aug. 7, 2008) (denying third-party payors' motions to enjoin interim payments).

with the letters L through Z were initially required to submit this information by July 1, 2008. Pre-Trial Order No. 29 imposes similar requirements on plaintiffs whose claims are filed or transferred to the MDL after November 9, 2007.

On December 10, 2007, certain plaintiffs (the "Benjamin Plaintiffs"), all of whom are represented by attorney Ronald Benjamin, appealed Pre-Trial Order No. 28 to the United States Court of Appeals for the Fifth Circuit. The Benjamin Plaintiffs sought to have the Fifth Circuit vacate the Court's requirement that plaintiffs' counsel produce case-specific expert reports. On March 28, 2008, the Fifth Circuit dismissed the Benjamin Plaintiffs' appeal without an opinion. *See In re Vioxx Prods. Liab. Litig.*, Case No. 07-31164 (5th Cir. March 28, 2008) (per curiam).

On April 17, 2008, certain other plaintiffs (the "Oldfather Plaintiffs") filed a motion to suspend or modify the requirements of Pre-Trial Order No. 28. The Oldfather Plaintiffs argued that PTO 28's requirements were premature as to those plaintiffs who alleged injuries for which the PSC had not yet developed general causation expert reports. With respect to plaintiffs who were eligible for the Vioxx Settlement Program, the Oldfather Plaintiffs argued that PTO 28 did not provide sufficient time to develop expert reports or seek new counsel. In essence, the Oldfather Plaintiffs contended that PTO 28 "is unfair and unilaterally slanted in favor of Merck, both in general and specific causation." *See In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741, 743 (E.D. La. 2008).

On May 30, 2008, the Court issued an Order & Reasons (the "May 30th Order") denying in part and

granting in part the Oldfather Plaintiffs' motion to vacate PTO 28. *Id.* In the Court's May 30th Order, the Court explained that PTO 28 "is a type of pre-trial order commonly known as a *Lone Pine* order," and that "[t]he United States Court of Appeals for the Fifth Circuit has recognized the value of and approved the use of *Lone Pine* orders in mass tort litigation." *Id.* (citing *Acuna v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000) (holding that it is within a district court's discretion to issue a *Lone Pine* scheduling order that essentially requires the production of "information that plaintiffs should have had before filing their claims")). In light of the advanced stage of the Vioxx litigation, the Court found that PTO 28 was appropriate and that, after nearly a decade of discovery, "it is not too much to ask a Plaintiff to provide some kind of evidence to support their claim that Vioxx caused them personal injury, whether the injury be deep vein thrombosis, a heart attack, an ulcer, or some other malady." *Id.*[2]

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[2] The Court explained that a *Lone Pine* order was particularly appropriate given the advanced stage of the Vioxx litigation, both in the federal MDL and the state courts:

> [I]n the present case, a *Lone Pine* order may not have been appropriate at an earlier stage before any discovery had taken place since little was known about the structure, nature and effect of Vioxx by anyone other than perhaps the manufacturer of the drug. But this case is no longer

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> in its embryonic stage. It has existed in state courts for over seven years and in this Court for over three years, and much discovery has taken place.... For nearly a decade, Plaintiffs' counsel throughout the country have been studying, exploring, and discovering all of the effects of Vioxx on the human body. In this MDL, the PSC did not selectively discovery only MI's or strokes, but rather they conducted general discovery on the effects Vioxx may or may not have on individuals. All of this material is and has been available to counsel in the individual cases.
>
> The Court finds that at this advanced stage of the litigation, it is not too much to ask a Plaintiff to provide some kind of evidence to support their claim that Vioxx caused them personal injury, whether that injury be deep vein thrombosis, a heart attack, an ulcer, or some other malady. Surely if Plaintiffs' counsel believe that such claims have merit, they must have some basis for that belief; after all this time it is reasonable to require Plaintiffs to come forward and show some kind of basic evidence of specific causation.

In re Vioxx Prods. Liab. Litig., 557 F. Supp. 2d at 744.

Accordingly, the Court denied the Oldfather Plaintiffs' request to vacate PTO 28. To ensure that all plaintiffs had a fair opportunity to comply with the requirements of PTO 28, however, the Court granted the Oldfather Plaintiffs' request to extend the deadlines for providing case-specific expert reports, allowing that claimants whose last names begin with the letters A though L should submit reports by July 1, 2008, whereas claimants whose last names begin with the letters M though Z should submit reports by August 1, 2008.

II. PRESENT MOTIONS

On June 30, 2008, the Benjamin Plaintiffs filed a motion seeking miscellaneous relief, including, *inter alia*: (1) the Court's resignation as Chief Administrator of the Vioxx Master Settlement Agreement; (2) an order vacating the Vioxx Master Settlement Agreement because it is in fact a class settlement subject to the requirements of Rule 23; (3) an amendment to PTO 28 to allow for alternate forms of proof or to extend the deadlines for submission of expert reports; (4) an order lifting the stay of discovery imposed by PTO 28; and (5) an order vacating Pre-Trial Order No. 37, which sets forth the terms of access to the PSC trial package. The Benjamin Plaintiffs have also filed a motion to stay any further orders of dismissal based on PTO 28 pending the Court's decision on their motion for miscellaneous relief. Both the Plaintiffs' Steering Committee and Merck have filed responses in opposition to the Benjamin Plaintiffs' motion. The Court will now address each of the Benjamin Plaintiffs' arguments in turn.

III. LAW & ANALYSIS

A. Motion for the Court's Resignation as Chief Administrator of the Vioxx Master Settlement Agreement

First, the Benjamin Plaintiffs seek the Court's resignation as Chief Administrator of the Vioxx Master Settlement Agreement. According to the Benjamin Plaintiffs, the Court should resign its role as Chief Administrator of the Settlement in part because the Court "is duty bound to exclude from compensation under the MSA the same injuries that are being pursued by plaintiffs in MDL 1657, and will have to rule on the viability of those injuries in the tort system." The Benjamin Plaintiffs offer no meaningful legal basis for their request. To the extent that the Benjamin Plaintiffs' motion might be interpreted as seeking judicial recusal pursuant to 28 U.S.C. § 455, however, the request is without merit.

Title 28, United States Code, Section 455 provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455. The Fifth Circuit has explained that recusal under § 455 is warranted only in those cases in which a "reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality." *IQ Prods. Co. v. Pennzoil Prods. Co.*, 305 F.3d 368, 378 (5th Cir. 2002). The facts of the instant case do not warrant recusal. As Chief Administrator of the Vioxx Master Settlement Agreement, the Court serves in an administrative capacity that has no substantive effect on its management of the MDL proceedings.

See In re Vioxx Prods. Liab. Litig., MDL No. 1657, 2008 WL 4091672, at *2 (E.D. La. Aug. 27, 2008) (explaining that the Court "has consistently exercised its inherent authority over the MDL proceedings in coordination with its express authority under the terms of the Settlement Agreement to ensure that the settlement proceedings move forward in a uniform and efficient manner"). The Court played no role in drafting the private settlement agreement reached by the parties; the Court has taken no position as to what types of claims should or should not have been included in the settlement; and, finally, the Court has consistently stated that it neither encourages nor discourages participation in the settlement. Accordingly, the motion for the Court's resignation is without merit.

B. Motion to Vacate the Master Settlement Agreement Pursuant to Rule 23

Second, the Benjamin Plaintiffs argue that the Vioxx Master Settlement Agreement should be vacated because the private, contractual agreement is in fact a class settlement subject to the requirements set forth in Rule 23. The Plaintiffs argue, among other things, that they were not adequately represented in the settlement discussions and that the settlement does not protect their individual interests.

The Benjamin Plaintiffs' reliance on Rule 23 is misplaced. This Court has previously denied class certification of personal injury Vioxx cases. *See In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 462-63 (E.D. La. 2006) (finding that the "number, uniqueness,

singularity, and complexity of the factual scenarios surrounding each case swamp any predominating issues"). Unlike a class settlement, the MSA is a private, opt-in settlement that was not secured through a settlement class vehicle and therefore poses no risk of binding any unwilling plaintiff to its terms. Despite the Benjamin Plaintiffs' rather unspectacular argument that plaintiffs' lead counsel may not bind the litigants in an MDL to a settlement agreement, the Benjamin Plaintiffs are unable to show how in fact they are "bound" by the terms of the private, opt-in settlement they seek to vacate. Lacking any support for their argument in legal precedent, the Benjamin Plaintiffs appear to base their request more on their own individual desire to rewrite the terms of the settlement. Accordingly, the motion to vacate is denied.

C. Motion to Modify Pre-Trial Order No. 28 to Allow for Alternate Forms of Proof or to Extend the Deadlines for Submission of Expert Reports

Third, the Benjamin Plaintiffs seek an order amending Pre-Trial Order No. 28 to allow for alternate forms of proof or to extend the deadlines for submission of expert reports. The Benjamin Plaintiffs propose two alternate forms of proof in lieu of case-specific expert reports: first, an attorney affirmation that the plaintiff has an expert who will opine that the plaintiff's injury was in fact causally related to Vioxx; or, second, a single affirmation opining a causal relationship between ingestion of Vioxx and the plaintiffs' non-eligible injuries. Alternatively, the Benjamin Plaintiffs seek an extension of the

deadlines for submission of case-specific expert reports for injuries not covered by the MSA. The Benjamin Plaintiffs allege that they were caught by surprise by PTO 28 because they were under the impression that it was the PSC's responsibility to pursue and prepare such information.[3]

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[3] Although the precise legal basis for the request is somewhat unclear, the Benjamin Plaintiffs do claim that their request is "injunctive, at least in part," and recite the four requirements for a preliminary injunction: (1) a substantial likelihood of success on the merits; (2) threat of irreparable injury if the relief is not granted; (3) injury to the movant outweighs injury to the non-movant; and (4) granting relief will serve the public interest. *See Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985). Nevertheless, it is clear that the Plaintiffs do not seek injunctive relief. To the extent that the request might be interpreted as a motion for injunctive relief, however, the Court finds that the Plaintiffs have made no showing as to any of the four elements necessary to succeed on such a request.

The request is similarly without merit to the extent that it might be interpreted as a motion for reconsideration. "A court's reconsideration of a prior order is an extraordinary remedy which should be used sparingly." *Motiva Enters. LLC v. Wegman*, No. 00-3096, 2001 WL 246414, at *2 (E.D. La. Mar. 12, 2001). Indeed, allowing the parties to seek reconsideration of the Court's orders simply because the parties might individually prefer a different

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For the reasons set forth in the Court's earlier opinion regarding PTO 28, the Plaintiffs' argument rings hollow. *See In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d at 743. As the Court explained, *Lone Pine* orders such as PTO 28 are intended "to handle the complex issues and potential burdens on defendants and courts in mass tort litigation." *Acuna*, 200 F.3d at 340. By requiring plaintiffs to produce *case-specific* expert reports, PTO 28 enables the Court "to identify and cull potentially meritless claims and streamline litigation" in this complex MDL. *Baker v. Chevron USA, Inc.*, Civ. A. No. 05-227, 2007 WL 315346, at *1 (S.D. Ohio Jan. 30, 2007). The Benjamin Plaintiffs' proposal to substitute alternate methods of proof would undermine the express purposes of the *Lone Pine* order. Similarly, the Plaintiffs' argument that PTO 28 imposes unduly burdensome requirements is simply not credible. As the Court has previously explained, "after all this time it is reasonable to require Plaintiffs to come forward and show the basis for their beliefs and show some kind of basic evidence of specific causation." *In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d at 744. Under scrutiny, the Benjamin Plaintiffs' motion for relief from PTO 28 amounts to

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result "would render the entire briefing process irrelevant and [would] lead to endless motions to reconsider." *Freeport-McMoran Sulphur, LLC v. Mike Mullen Energy Equip. Res.*, No. 03-1496, 2004 WL 1488665, at *1 (E.D. La. June 30, 2004). Accordingly, to the extent that the Benjamin Plaintiffs' request might be interpreted as a motion for reconsideration, it is denied.

little more than a thinly-veiled motion to vacate the order.[4] Accordingly, the motion is denied.[5]

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[4] In connection with their request to amend the terms of PTO 28, the Benjamin Plaintiffs also seek an order lifting the stay imposed by PTO 28, as well as an order vacating PTO 37, which sets forth the terms for access to the PSC's trial package. As the PSC makes clear in its response brief, however, the Benjamin Plaintiffs are free to "inspect and photocopy at their expense any non-work product document available in the depository consistent with this Court's other pretrial orders but without the obligation imposed by PTO No. 37." Accordingly, the request to vacate PTO 37 is dismissed as moot. Similarly, with respect to the Benjamin Plaintiffs' request to lift the stay imposed by PTO 28, the Plaintiffs' request is denied. The Court imposed the stay of discovery for good reason and will lift the stay at an appropriate time.

[5] Both the Plaintiffs' Steering Committee and Merck contend that Mr. Benjamin is merely employing the same failed discovery tactics that resulted in dismissal of his clients' cases in the *In re Diet Drug* litigation. *See In re Dieg Drugs*, 30 Fed. Appx. 27, 2002 WL 272351 at *1 (3d Cir. Feb. 26, 2002). In that litigation, the Third Circuit affirmed the district court's dismissal of Mr. Benjamin's cases after he repeatedly refused to comply with the district court's requirement that plaintiffs produce case-specific expert reports. In affirming dismissal of the plaintiffs' cases, the Third Circuit explained that

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the dismissal was warranted given Mr. Benjamin's litany of discovery abuses:

> Suffice it to say, appellants have been the victim of some bad lawyering by their trial counsel, Ronald R. Benjamin. Indeed, Benjamin's discovery abuses can be summarized as a parade of obstinance that ultimately cost his clients their day in court. The origin of Benjamin's discovery mischief dates back to October 18, 1999, when case-specific expert designations were due. Benjamin failed to honor this deadline. Instead, he objected to the need for disclosure before the District Court ruled on a related *Daubert* motion, citing the cost of obtaining expert reports.
>
> It is not necessary to burden this Opinion with a recounting of each and every subsequent instance of Benjamin's obstinance. In short, counsel had numerous opportunities to comply with the District Court's longstanding discovery order, yet stubbornly clung to his argument that he should not have to designate experts. Neither multiple express rejections of this already-rejected argument, nor threats of dismissal ameliorated counsel's defiance to the discovery schedule....

(cont'd)

IV. CONCLUSION

For the reasons stated above, the Benjamin Plaintiffs' Motion for Miscellaneous Relief (Rec. Doc. 14938) and Motion for a Stay (Rec. Doc. 16803) ARE DENIED.

New Orleans, Louisiana, this 10th day of December, 2008.

UNITED STATES DISTRICT JUDGE

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> On August 24, 2000, more than ten months after designations were due, the Special Discovery Master gave Benjamin yet another chance to do what he had, over many months, been ordered to do. Benjamin failed to seize this opportunity and the Special Master recommended dismissal as a sanction.

In re Diet Drugs, 30 Fed. Appx. 27, 2002 WL 272351 at *1 (3d Cir. Feb. 26, 2002).